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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

TELEPHONE NEWS SYSTEM, INC., an Illinois corporation,

Plaintiff-Appellant,

vs.

ILLINOIS BELL TELEPHONE COMPANY, an Illinois corporation,

Defendant-Appellee,

UNITED STATES OF AMERICA,

Intervenor-Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

JURISDICTIONAL STATEMENT.

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JURISDICTIONAL STATEMENT.

This appeal is taken by Telephone News System, Inc. (plaintiff) from the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, dismissing plaintiff's complaint which sought to enjoin Illinois Bell Telephone Company (defendant) from discontinuing telephone facilities furnished to plaintiff.

OPINIONS BELOW.

Two opinions were rendered in the instant case. The first, *Telephone News System, Inc.* v. *Illinois Bell Telephone Co.*, 210 F. Supp. 471, was by the District Judge who found against the plaintiff on the factual issues presented, but determined that a substantial constitutional question was presented by the statute involved and, therefore, convened a three judge District Court (210 F. Supp. 477, 478). Thereafter, the District Court of three judges rendered its opinion which is reported at 220 F. Supp. 621.

Kelly v. *Illinois Bell Telephone Co.*, 210 F. Supp. 456, is companion to the *Telephone News* case reported at 210 F. Supp. 471.

The foregoing three opinions are printed as Appendices A, B, and C, respectively.

JURISDICTION.

This action was brought to enjoin Illinois Bell Telephone Company from disconnecting, discontinuing, or otherwise terminating the telephone facilities furnished by it to the plaintiff. On April 25, 1962, the Department of Justice, by an Assistant Attorney General, wrote to the Illinois Bell Telephone Company ordering that, pursuant to the provisions of Title 18 USC §1084(d), the telephone company discontinue the leasing of its telephone facilities to the plaintiff. This directive was issued, the letter said, on the ground that information in the files of the Department of Justice revealed that plaintiff's telephone facilities were being and would be used for the transmission and receiving of gambling information in interstate commerce in violation of Federal law. April 27, 1962, the telephone company, in compliance with the government's letter, wrote to the plaintiff that its telephone services

would be discontinued on May 5, 1962. Plaintiff's complaint for a temporary restraining order and permanent injunction followed. The judgment of the District Court of three judges dismissing the compiaint was entered August 14, 1963. Plaintiff's Petition for Rehearing was denied September 23, 1963. Plaintiff's Notice of Appeal was filed November 21, 1963.

This court's jurisdiction of the appeal is conferred by 28 USC §1253 and §2101(b).

The following cases sustain the jurisdiction of this Court to review the judgment on direct appeal: *Paul* v. *United States*, ... U.S. ....., 9 L. ed. 2d 292, 296; *United States* v. *Georgia Pub. Serv. Com.*, ... U.S. ....., 9 L. ed. 2d 317, 320; *Hannah* v. *Larche*, 363 U.S. 420, 428; *Query* v. *United States*, 316 U.S. 486, 490; *Radio Corp. of America* v. *United States*, 95 F. Supp. 660, 664, affirmed, *Radio Corp. of America* v. *United States* 341 U.S. 412.

STATUTES INVOLVED.

1. Title 18 USC §1084(d):

> §1084. Transmission of wagering information: penalties
>
> (a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.
>
> (b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign

commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored. Added Pub.L. 87-216, § 2, Sept. 13, 1961, 75 Stat. 491.

2. Sections 28-1(a)(10) and 34-4 of the Illinois Criminal Code of 1961 (Ill. Rev. Stat., 1961, Ch. 38, §28-1(a)(10) and §34-4), effective January 1, 1962:

"§28-1. Gambling.

(a) A person commits gambling when he:

• • •

(10) Knowingly transmits information as to wagers, betting odds, or changes in betting odds by

telephone, telegraph, radio, semaphore or similar means; or knowingly installs or maintains equipment for the transmission or receipt of such information.

"§34-4. This code shall take effect January 1, 1962."

QUESTIONS PRESENTED.

1. Whether the procedures authorized by 18 USC §1084(d) on their face or as here applied, violate the constitutional guaranties afforded by the Fifth and Sixth Amendments to the Constitution because they permit removal of plaintiff's telephone facilities and the resultant destruction of its business after a civil trial upon a criminal charge, despite the fact that the Government was self admittedly the real party in interest, the quantum of proof required to authorize a judgment that a criminal statute had been violated was a preponderance of the evidence, in which proceeding there was no right to be indicted for violating a specific statute, to confront witnesses, or to be presumed guilty until proven otherwise, and the right to be afforded any of the other guaranties of a criminal trial was missing.

2. Could the single judge and three judge court properly predicate their finding that plaintiff had violated Section 28-1(a)(10) of the Illinois Criminal Code of 1961 by transmitting gambling information in interstate commerce when:

(a) The only testimony or evidence in the record concerning any transmissions in interstate commerce by plaintiff was that such interstate transmissions did not extend beyond October, 1961, and

(b) The Illinois Criminal Code of 1961 did not, by its terms, become effective until January 1, 1962?

3. Is Section 28-1(a)(10) of the Illinois Criminal Code of 1961 on its face or as here applied prohibiting the transmission of information as to wagers, betting odds or changes in betting odds, such a prohibition being unrelated in time to any race, game or contest, repugnant to the First and Fourteenth Amendments to the Constitution of the United States as a denial of free speech and an unreasonable exercise of the police power of the State of Illinois?

STATEMENT OF THE CASE.

Plaintiff, an Illinois corporation, has, since 1956, provided without charge certain recorded information concerning horse racing to the general public. Anyone can obtain such information by dialing plaintiff's telephone number which is listed in the Chicago directory. Through a device known as a "Sports Printer", leased from United Press International News Service, plaintiff receives daily news and results of various sporting events, including horse racing. The identical information received by Telephone News over the facilities of the Sports Printer, including information relative to entries, jockeys, weights, odds, results, scratches*, and mutuel prices is furnished in precisely the same manner by United Press International to all of the major daily newspapers throughout the country.

After receiving the results and mutuels of the races from various of the tracks throughout the country, plaintiff causes voice recordings of such information to be made in its offices. These recordings give the name of the horses finishing first, second, and third, and the mutuel price returned by the winner. Each of the recordings contains the results of approximately five races at different major tracks throughout the country.

* Scratches are horses which have been withdrawn or eliminated from a race.

The recordings are transcribed on an electronic device leased from Illinois Bell Telephone Company. From approximately 1:00 P.M. until 6:00 P.M. daily, except Sundays, the recordings are revised and brought up to date on an average of four or five times a day to reflect the results of later races after information concerning the same is received by plaintiff over the facilities of the Sports Printer. The interval between the time the results and mutuels of a race at any given track become official and the time such information is transmitted over the Sports Printer varies from a minimum of twelve minutes to a maximum of thirty minutes. On days when sports news is unusually heavy, substantial delays in transmitting the results occur.

On the date the plaintiff filed its complaint its income was derived from payments received from Illinois Sports News in the amount of $600.00 per week. In consideration for this weekly payment, Illinois Sports News received spot advertising commercials, which messages were transcribed on the same recordings disseminating the other racing information as afore-described. The advertising facilities of the plaintiff were equally available to all who might desire to use them.

On April 25, 1962, the United States Department of Justice, by Herbert J. Miller, Jr., Assistant Attorney General, wrote to Illinois Bell Telephone Company as follows:

"Mr. Floyd Brown
Security Department
Illinois Bell Telephone Company
212 West Washington Street
Chicago 6, Illinois

Dear Mr. Brown:

Information in the files of the Department of Justice reveals that the telephone facilities located

at the following place are being and will be used for the transmission and receiving of gambling information in interstate commerce in violation of Federal law:

Telephone News System, Incorporated
81 West Van Buren Street
Chicago, Illinois
(WEbster 9-1900)

Pursuant to the provisions of subsection (d) of Section 1084 of Title 18, United States Code, you are therefore required to discontinue the leasing of said facilities, after reasonable notice to the subscriber."

/s/ Herbert J. Miller, Jr.,
Assistant Attorney General

Under date of April 27, 1962, the Telephone Company, by F. H. Brown, Chief Special Agent, wrote to plaintiff as follows:

"Telephone News System, Incorporated
81 West Van Buren Street
Chicago, Illinois

Gentlemen:

We have received a letter from the United States Department of Justice, acting under Title 18 of the U.S. Code, Section 1084(d), requiring us to discontinue service on the telephone facilities furnished to you at 81 West Van Buren Street, Chicago, Illinois, after reasonable notice to you.

It is our present intention to comply with this letter at 9 A M., C.D.T., on May 5, 1962."

Very truly yours,
/s/ F. H. Brown,
Chief Special Agent

On May 4, 1962, plaintiff filed its complaint in the District Court naming Illinois Bell Telephone Company

as defendant, praying that initially a temporary restraining order issue against the defendant, and upon final hearing and determination a permanent injunction be entered restraining it from in any manner interfering with, disconnecting, or terminating the telephone facilities furnished by it to plaintiff. In its complaint plaintiff denied that it was, in the words of Mr. Miller, using its telephone facilities for the transmission and receiving of gambling information in interstate commerce in violation of Federal law. In the alternative, it contended that Title 18 §1084(d) was unconstitutional and void.

Pending final determination, the court entered a temporary restraining order preventing removal of plaintiff's telephone facilities.

Within five days after the complaint was filed, the United States filed a motion to intervene as of right, or in the alternative for permissive intervention, alleging that it was the real party in interest, contending that, "the controversy is, as a practical matter, actually between the plaintiff and the Government." On the same day, the Government filed its answer to the complaint whereby it put in issue the question of whether plaintiff was guilty of the charges contained in Miller's letter to the Telephone Company concerning plaintiff's alleged illegal use of its telephone facilities in violation of Federal Law. The telephone company filed a neutral answer approximately three weeks later.

Ten days later, pursuant to notice, the Government took the evidence deposition of LeRoy Retelle on May 22, 1962 at Grand Rapids, Michigan. The testimony adduced by the Government from Retelle was that he had been a bookmaker in Lansing, Michigan from 1957 to October 5, 1961, accepting bets on horse races and

football games. He further testified that in the course of his bookmaking activities he had occasion on the average of six times a week to call the number of Telephone News in Chicago from Lansing, Michigan for the purpose of obtaining certain information as to which horses had been "scratched", which information he used in his business. However, he testified positively that he ceased his bookmaking activities in October of 1961 and never used the facilities of Telephone News subsequent to October 5, 1961 (Retelle's Dep., p. 13). This was the only testimony or evidence in the record concerning the fact that plaintiff's telephone facilities had even been used to transmit or receive racing information in interstate commerce.

The single judge District Court found that plaintiff had not violated any Federal law, but that its activities as above described did violate Section 28-1(a)(10) of the Illinois Criminal Code of 1961. This finding was based solely upon the testimony of Retelle that he had called plaintiff's number to obtain information as to horses which had been "scratched," or eliminated, from the day's racing (Retelle's Dep., p. 16). Retelle further testified that he had never called the plaintiff's number in the afternoon, that he had never obtained any race results or mutuels via plaintiff's facilities, that he had obtained race results from a radio station in Canada (Retelle's Dep., pp. 27, 28) but that he had only called in the morning to ascertain what horses had been "scratched" in order to insure that he would not accept a bet on a horse not running that day. Despite this fact, the single judge District Court found(App., 3a, 10a) (a finding which was concurred in by the three judge Court (App., 42a, 43a), that plaintiff violated the Illinois statute by transmitting relatively fast or rapid information as to results and mutuels in interstate commerce. Retelle never testified

to such a state of facts, and the record is, consequently devoid of any testimony to support that conclusion.

The District Court of three judges (Judge Will specially concurring) rejected plaintiff's arguments that section 1084(d) of Title 18, USC is unconstitutional, holding that it accords due process to one situated as plaintiff on the ground that the sanction imposed upon a finding of guilty cannot be defined as "punishment" in the criminal sense and that the procedures employed are sustained by the familiar principles applicable to proceedings in forfeiture or libel cases.

Judge Will concurred in the majority's conclusion on the ground that although the incongruity of the ultimate judgment produced was necessarily assured by the incongruous procedure authorized by §1084(d) (App. 47a, 48a), the cases governing forfeiture or libel proceedings appear to sustain the judgment.

THE QUESTIONS ARE SUBSTANTIAL.

This case presents substantial questions concerning the constitutionality of a statute enacted in 1961 (Title 18 USC §1084(d)) investing all law enforcement agencies—Federal, State, and local—with a novel means of prosecuting those accused of violating a Federal, State or local law involving the transmission of gambling information in interstate commerce. It involves the issue of whether law enforcement agencies, on the basis of information ostensibly contained in their files can, by threatening removal of a telephone subscriber's communication facilities, force an involuntary initiation by the subscriber of a civil equity proceeding to protect his property, thus converting a criminal into a civil proceeding, and thereby effectively eliminate all of of the traditional safeguards which are guaranteed one accused of a crime (App 46a, 47a). This case can determine whether Title 18 USC §1084(d)

will be the prototype of a new brand of law whereby crimes will be prosecuted civilly in such fields as anti-trust, the sale and distribution of securities, income and sales taxes, and union activities, on the grounds that confiscation of a business is not punishment and that the forfeiture and libel laws are authority for proceeding in the manner in question (App. 48a, 49a).

It further presents the question of whether the plaintiff has been found guilty of violating the provisions of a state law which did not become effective until three months after the last of the events transpired upon which the finding of guilty is predicated.

Lastly, the question is presented as to whether section 28-1(a)(10) of the Illinois Criminal Code of 1961 on its face, or as here applied, prohibiting the transmission of any information as to wagers, betting odds, or changes in betting odds, such prohibition being unrelated in time but in race, game, or contest, is repugnant to the First and Fourteenth Amendments to the Constitution of the United States as constituting a denial of free speech and an unreasonable exercise of the police power of the State of Illinois.

THE PROCEDURES AUTHORIZED BY TITLE 18 USC §1084(d) AND EMPLOYED IN THIS PROCEEDING DEPRIVE PLAINTIFF OF THE RIGHTS GUARANTEED TO IT BY THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The majority opinion predicates its finding on the premise that section 1084(d) of Title 18, USC is preventive or remedial only, not punitive, that the procedures authorized by it are reasonably calculated to eradicate organized gambling and, therefore, eliminate the need for the procedural safeguards afforded to one

accused of crime. It holds that these protections need not be extended to a telephone subscriber charged, tried, and convicted in a civil proceeding of violating a State law involving gambling. The opinion further holds that the nature of the action below was similar to a forfeiture proceeding, that it was, consequently, in rem, and partook of the nature of a civil suit, not a criminal proceeding.

The effect of the majority opinion is to sanction governmental "regulation" of crimes via civil proceedings. It holds that if a business is destroyed en route, though the result may seem harsh, yet this is but a necessary adjunct of the regulatory power invested in Congress. The cases cited by the majority in support of its holding that the statute is non-penal involve legislation regulating a particular type of business or profession by enactments excluding from the field those who had, in the past, been convicted of a crime (*Murphy* v. *United States*, 272 US 630; *De Veau* v. *Braisted*, 363 US 144; *Barsky* v. *Board of Regents*, 347 US 442; *Flemming* v. *Nestor*, 363 US 603).

Thus, in *De Veau* v. *Braisted*, 363 US 144, the attack was upon a New York statute barring convicted felons from holding any office in the Waterfront unions. This court upheld the constitutionality of the statute upon the ground that it was a preventive, or regulatory measure, reasonably designed to effect elimination of criminal elements from the New York waterfront. But the *sine qua non* of the statute there involved was past conviction of a felony. The question in the instant case is whether the Government may obtain what is tantamount to a conviction of crime in a civil proceeding and then, upon that basis *and in the same proceeding*, put a person out of business. Likewise, in *Flemming* v. *Nestor*, 364 US 603, the statute

in question provided for the termination of benefits payable under the Social Security Act to an alien person deported under the provisions of the Immigration and Nationality Act. Nestor had been deported for being a communist and by reason thereof his benefits under the Act were discontinued. This Court, in a five to four opinion, held that terminating Nestor's social security benefits did not amount to punishing him without a judicial trial. Deprivation of those benefits, this Court held, did not amount to "punishment" because Nestor had never become absolutely vested with the right to receive the benefits.

This Court said (363 US 617):

> "*Here the sanction is a mere denial of a noncontractual governmental benefit. No affirmative disability or restraint is imposed*, and certainly nothing approaching the 'infamous punishment' of imprisonment, as in *Wong Wing*, on which great reliance is mistakenly placed." (Emphasis added).

We respectfully submit that the order of the District Court decreeing the demise of the plaintiff can hardly be said not to be the imposition of an affirmative disability or restraint.

In *Barsky* v. *Board of Regents*, 347 US 442, another case cited in the majority opinion, the question was whether a state could bar from practice physicians convicted of a crime. There, again, the condition precedent to the exclusion of the physician was the fact of conviction of a crime in another and unrelated criminal proceeding.

These cases do not furnish support for validating the civil procedures adopted by the Government to find plaintiff guilty of violating a State law, and the resultant

decree that it shall lose its business. The issues in *De Veau, Flemming* and *Barsky* were whether or not past convictions could form the basis for automatic exclusion from participating in a particular profession or occupation, or the loss of certain non-contractual benefits.

But even adopting the District Court's reasoning that the question of whether or not the Government can proceed as it did below is governed by whether Section 1084(d) is a penal statute or merely a regulative one, we say that it is clearly penal. First of all Section 1084(d) is entitled, "Transmission of wagering information; *penalties*." (Emphasis added). In discussing whether a statute is penal or not, in *Trop* v. *Dulles*, 356 US 86, 95, 96, this Court said:

> "In form Section 401(g) appears to be a regulation of nationality. The statute deals initially with the status of nationality and then specifies the conduct that will result in loss of that status. But surely form cannot provide the answer to this inquiry. A statute providing that 'a person shall lose his liberty by committing bank robbery,' though in form a regulation of liberty, would nonetheless be penal. Nor would its penal effect be altered by labeling it a regulation of banks or by arguing that there is a rational connection between safeguarding banks and imprisoning bank robbers. The inquiry must be directed to substance.
>
> "This Court has been called upon to decide whether or not various statutes were penal ever since 1798. *Calder* v. *Bull*, (US) 3 Dall 386, 1 L ed 648. Each time a statute has been challenged as being in conflict with the constitutional prohibitions against bills of attainder and ex post facto laws, it has been necessary to determine whether a penal law was involved, because these provisions apply only to statutes imposing penalties. In deciding whether or

not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a non-penal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature. The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise."

To paraphrase the foregoing opinion, to say that a person shall lose his business by transmitting gambling information interstate, though in form a regulation of gambling, would nonetheless be penal. Nor would its penal effect be altered by labeling it a regulation of gambling or by arguing that there is a rational connection between eliminating organized gambling and destroying one of the means by which it exists. The inquiry must be directed to substance.

We respectfully submit to argue that the procedures authorized by 18 USC §1084(d), which have culminated in plaintiff's loss of business, are regulatory, not punitive, is a gossamer-like conclusion which does not comport with reality.

Plaintiff will be put out of business as a proximate result of having been found guilty in a civil trial of transmitting gambling information in interstate commerce. A law which authorizes such a consequence ordains punishment as surely as does one which forfeits citizenship, *Mendoza-Martinez* v. *Kennedy*, 372 US 144, and the person faced with this consequence is entitled to the protection which the Fifth and Sixth Amendments to the Constitution guarantee everyone charged with a crime, as that case holds.

The proceedings below, characterized as "incongruous" in the concurring opinion (App. 47a, 48) cannot be sustained, as the majority seek to do, on the ground that the action involved is in the nature of a forfeiture proceeding, thus civil in nature (App. 25a), thereby authorizing a dispensation of the traditional safeguards attendant upon criminal prosecution. First of all, there is in the courts no inherent jurisdiction to condemn. The right to forfeit must be found in the plain language of the statute, *United States* v. *Lane Motor Co.*, 199 F2d 495, 496, 497, aff'md, *United States* v. *Lane Motor Co.*, 344 US 630; *United States* v. *Kaier*, 61 F2d 160. There is no authority to forfeit contained in Section 1084(d). Secondly, Section 1084(d) provides by its terms that, . . . "*no damages, penalty, or forfeiture, civil or criminal*, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency." (Emphasis supplied). Thus, there is also contained in the very statute relied upon, an affirmative prohibition against forfeiture proceedings taking place.

In his concurring opinion Judge Will has described more persuasively than we the insidious nature of this statute and the results which the procedures it authorizes

may ultimately legitimatize if pursued to their logical conclusion. Should the techniques employed in this case be approved, then as Judge Will said (220 F. Supp. 643):

> "In our inter-dependent economy, where rapid communication is vital to virtually every commercial enterprise, the withdrawal of telephone facilties on the ground that some federal, state or local law enforcement officer has reason to believe that they are being used in violation of a federal, state or local law, may prevent some law violations. But it will also eliminate all of the basic safeguards which we have so carefully developed to protect the accused even though he be ultimately found guilty.
>
> "And, of course, the technique need not be limited to telephone facilities, since the withdrawal of other utility services would be equally proper."

THE FINDING BY THE SINGLE JUDGE AND THREE JUDGE COURT THAT PLAINTIFF HAD VIOLATED SECTION 28-1(a)(10) OF THE ILLINOIS CRIMINAL CODE OF 1961 WAS BASED ON EVENTS WHICH OCCURRED PRIOR TO THE EFFECTIVE DATE OF THE STATUTE. THE PLAINTIFF HAS, THEREFORE, BEEN EXPOSED TO THE OPERATION OF AN EX POST FACTO LAW.

None of the evidence introduced by the government showed that plaintiff's facilities had ever been used to transmit any information in interstate or foreign commerce subsequent to October 5, 1961.

In order to prove a case under §1084(d), it was incumbent upon the Government to show two things:

> (1) That the facilities of plaintiff had been used for the purpose of transmitting or receiving gambling information in violation of Federal, State or local law, and

(2) That such transmission or reception had been in interstate or foreign commerce.

The only testimony as to any use made of plaintiff's facilities was furnished by LeRoy Retelle, who testified that he obtained "scratch" information, *i.e.* the names of horses which had been withdrawn or eliminated from the day's racing, by calling plaintiff's telephone number in Chicago, Illinois. These calls were placed from Lansing, Michigan during the period of approximately 1957 to October, 1961. Thus did the Government establish the interstate character of plaintiff's transmissions. *However, Retelle testified in positive terms that he never placed a call to plaintiff's number subsequent to October 5, 1961* (Retelle's Dep., pp. 13, 14, 15, 18).

Section 34-4 of the Illinois Criminal Code of 1961 (Ill. Rev. Stat., 1961, Ch. 38, §34-4) provides as follows:

"This Code shall take effect January 1, 1962."

There is no finding in either of the two opinions rendered in this case that there was any evidence in the record which proved an interstate use of plaintiff's facilities in violation of the Illinois law, with the exception of Retelle's testimony. The opinion by the single judge Court, the three judge Court, and the concurring opinion make this abundantly clear (*Telephone News System, Inc.* v. *Illinois Bell Telephone Co.*, 210 F. Supp. 471, 473, 476; *Telephone News System, Inc.* v. *Illinois Bell Telephone Co.*, 220 F. Supp. 621, 624, 641).

Upon these facts, to sustain the finding that plaintiff had violated the Illinois statute would be to subject it to the operation of an ex post facto law. In *Burgess* v. *Salmon*, 97 US 381, this Court decided the precise question presented here:

"The case presents but a single point: Can a manufacturer be punished, criminally and civilly, civilly here, for the violation of a statute when the statute was not in force at the time the act was done? In other words: Can a person be thus punished when he did not contravene the provisions of the statute. . . ."

The question was answered in the negative, this Court saying (97 US 384):

"In the present case, the acts and admissions of the government establish the position that the duties exacted by law had been fully paid, and the goods had been surrendered and transported before the President had approved the act of Congress imposing an increased duty upon them.

"To impose upon the owner of the goods a criminal punishment or a penalty of $377 for not paying an additional tax of four cents a pound, would subject him to the operation of an *ex post facto* law.

"An *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed, or a punishment in addition to that then prescribed. *Carpenter et al.* v. *Commonwealth of Pennsylvania*, 17 How. 456.

"Had the proceeding against Salmon & Hancock been taken by indictment instead of suit for the excess of the tax, and the one was equally authorized with the other, the proceeding would certainly have fallen within the description of an *ex post facto* law."

To the same effect is *Johannessen* v. *United States*, 225 U.S. 227, 242.

We submit the record is clear that the Government has failed to introduce any evidence proving that plaintiff violated the Illinois statute.

SECTION 28-1(a)(10) OF THE ILLINOIS CRIMINAL CODE VIOLATES THE FOURTEENTH AMENDMENT TO THE CONSTITUTION IN THAT IT EXCEEDS THE POLICE POWER OF THE LEGISLATURE TO ENACT AND VIOLATES THE FIRST AMENDMENT TO THE CONSTITUTION BECAUSE IT PROHIBITS, IN TOTO, THE TRANSMISSION BY TELEPHONE OF INFORMATION TO WAGERS, BETTING ODDS, OR CHANGES IN BETTING ODDS UNRELATED IN TIME TO ANY RACE, GAME, OR CONTEST.

If the purpose and objective of section 28-1(a)(10) of the Illinois Criminal Code is to suppress and eliminate gambling, the question then becomes whether that section is a valid exercise of the police power of the State reasonably designed to remedy the evils toward which it is directed. If not, it violates the Fourteenth Amendment to the Constitution of the United States.

In the proceedings below, and here, plaintiff relies principally upon one case which, it is respectfully submitted, controls the question. In *Parkes* v. *Judge of Recorder's Court*, 236 Mich. 460, 210 N.W. 492, 47 A.L.R. 1128 complaints were filed against four Detroit newspapers on the ground that they had violated a Michigan statute entitled, "An act to suppress gambling and to prohibit the publication and furnishing of information concerning gambling." Section 4 of the act provided, in pertinent part, as follows:

> "Section 4. It shall be unlawful for any person . . . by means of any newspaper, periodical, poster, notice or other mode of publication or reproduction to . . . print . . . or distribute to the public . . . or to any person . . . any statement or information concerning the making or laying of wagers or bets or to selling of pools or evidences of betting odds on any race, contest or game or on the happening of any event . . . contest or game. . . . The acts

herein prohibited may be deemed violations hereof when committed, after any game, contest, race or event, as well as when committed before any such game, contest, race, or event. . . ."

The Detroit Times was alleged to have violated the section by reason of the fact that an account of the Kentucky Derby appeared in its paper, containing the statement, "A $2 ticket on Flying Ebony paid $8.30."

The complaint against The Detroit Free Press involved a story to the effect that Mike McTigue "says he has laid $5,000 to $20,000 that he will stop Paul Berlenbach in their fight for the light heavyweight title at Yankee Stadium one week from tonight."

The Detroit News was charged with an offense because it carried substantially the same article as the Detroit Free Press.

The fourth defendant, Union News Company, a distributor, was charged with having sold and distributed issues of the New York Times which carried an account of an English horse race, together with the odds and price paid by the winner.

The foregoing complaints were presented to respondent, Judge of the Recorder's Court, and he refused to issue warrants on the ground that section 4 of the act on which the prosecution was based was unconstitutional because in conflict with the 14th Amendment to the Federal Constitution and that of the State Constitution. Mandamus proceedings were then instituted to compel him to issue the warrants.

Upon appeal to the Supreme Court of Michigan, the statute was held valid insofar as it prohibited the publication of the proscribed information *before* the happening of any race, game, or event, but found the statute un-

constitutional with reference to the prohibition against publication of such information *after* the event had taken place. The Michigan Supreme Court said (236 Mich. 468, 469):

> "It is argued that the court should construe the statute as having application only to harmful publications, that is, publications that have a tendency to encourage gambling. But when a case is prosecuted under this statute, who is to determine whether the publication is harmful? By prohibiting them the legislature has said that all publications of betting odds after the event are harmful, because they encourage gambling. And it having so declared, a jury would not be permitted to find otherwise. In other words, the mere fact of publication without regard to time or circumstances, or connection with any event, is made a violation of the statute. Has the legislature a right to do this? Its power to prohibit such publications rests upon a duty to protect the public against the injurious results that may follow. Therefore, when it prohibits publications that have no harmful public tendency, it exceeds its constitutional authority. It is our judgment that its wholesale prohibition of publications concerning bets and wagers unrelated in time to any race, game or contest, is an unreasonable exercise of police power, and is therefore beyond the constitutional authority of the legislature."

The majority opinion below attempts to sustain section 28-1(a)(10) of the Illinois Code by referring to the statement of the Joint Committee which drafted the Illinois Criminal Code (App., 42a) and draws from that statement the conclusion that the legislative purpose was to forbid rapid transmission of information concerning wagering shortly after the event. However, a reading of the statement issued by the Joint Committee and quoted by the court (App., 42a) discloses that it says nothing about transmissions occurring shortly after the event.

The Illinois statute says that a person "commits gambling" when he knowingly transmits the information described in section 28-1(a)(10). Therefore, just as in the *Parkes* case if an indictment were returned in 1964 by an Illinois Grand Jury charging a violation of the section on the ground that a person had knowingly transmitted information as to wagers, betting odds, or changes in betting odds concerning, for example, the 1962 Kentucky Derby, the jury would not be permitted to find the defendant not guilty if the specified facts were proved. As the Michigan Court said, "In other words, the mere fact of publication without regard to time or circumstances, or connection with any event, is made a violation of the statute."

In addition, it is clear that plaintiff only gives wider circulation to the information it receives via the leased United Press International News Service Sports Printer. The major daily newspapers receive and print precisely the same information which they obtain over the same facilities. Clearly, it is physically impossible for the information disseminated by plaintiff to be "fast" or "rapid" unless the same information furnished by United Press to the dailies throughout the country is also "fast" or "rapid." There has been no contention made that the information transmitted over the United States Sports Printer is illegal, or becomes so when printed by the newspapers. We do not argue upon hypotheses, but do say that if plaintiff is guilty of violating a law when it subsequently disseminates information legal when received by it, then there is a denial to it of the guaranties of the First Amendment to the Constitution and discrimination is practiced against plaintiff in favor of persons engaged in disseminating the same news by wire service.

CONCLUSION

The questions presented by this appeal are substantial and of compelling public importance. It is respectfully submitted that the Court should note its probable jurisdiction in order that it may be advised by briefs and oral arguments on the questions involved.

Respectfully submitted,

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No. 772

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

TELEPHONE NEWS SYSTEM, INC., an Illinois corporation,

Plaintiff-Appellant,

vs.

ILLINOIS BELL TELEPHONE COMPANY, an Illinois corporation,

Defendant-Appellee,

UNITED STATES OF AMERICA,

Intervenor-Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

APPENDIX TO JURISDICTIONAL STATEMENT.

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APPENDIX A.

TELEPHONE NEWS SYSTEM, INC., an Illinois corporation,

Plaintiff,

v.

ILLINOIS BELL TELEPHONE COMPANY, an Illinois corporation,

Defendant,

UNITED STATES OF AMERICA,

Defendant-Intervenor.

Civ. A. No. 62 C 941.

United States District Court
N. D. Illinois, E. D.
October 23, 1962.

WILL, District Judge.

The Court, having examined the pleadings, the Stipulations of Facts, and the documents admitted as evidence in this case, and having heard the arguments of and examined the briefs filed by counsel makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Telephone News Systems, Inc. (hereinafter called "plaintiff") is an Illinois corporation organized and existing since 1954. All of the issued and outstanding shares of said corporation are owned by Raymond J. MacMahon and Berneice MacMahon. Raymond J. MacMahon is president of the plaintiff, Berneice MacMahon is secretary and treasurer, and the three directors of plaintiff are Raymond J. MacMahon, Berneice MacMahon and Wilbur Hirtzer.

2. Plaintiff has been engaged in the business and activities hereinafter set forth since 1956 and maintains its office and principal place of business at 81 West Van Buren Street, Chicago, Illinois.

3. The defendant, Illinois Bell Telephone Company (hereinafter referred to as "Telephone Company"), is an Illinois corporation with its principal place of business at 212 West Washington Street, Chicago, Illinois. It is the only utility furnishing telephone service in the Chicago, Illinois area.

4. Plaintiff leases from United Press International News Service (hereinafter referred to as "United"), a device known as a "Sports Printer" through which it receives daily information and results of various sporting events.

5. The interval between the time the results and mutuels on a horse race at an given track become official and the time such information is transmitted by United over its Sports Printer service varies from a minimum of twelve minutes to a maximum of thirty minutes.

6. After receiving the results and mutuels of the races over the facilities of the United Sports Printer, plaintiff causes voice recordings to be made in its offices, which recordings give the name of the horses finishing first, second and third, and the mutuel price paid by the winner only. Each of said recordings contains the results of approximately five races at the various major tracks throughout the country. On the last recording of the day, the win, place and show horses, together with the mutuel price paid by the winner only, is given. Also is recorded the name of the winner of the next to last race and the mutuel price paid thereon. The aforesaid last recording is played presently continuously from the time of its transcription at approximately 6:00 P.M. until the next day when, at approximately 1:00 P.M., new recordings are made as racing information becomes available to plaintiff from United.

Prior to April 30, 1962, information concerning the scratches was disseminated by recording, in the same manner as heretofore described, beginning at approximately 9:30 A.M. each racing day.

7. These recordings are transcribed on an electronic device leased from Telephone Company, and from approx-

imately 1:00 P.M. until 6:00 P.M. daily, except Sundays, said recordings are revised and brought up to date on an average of four or five times per hour in order to reflect the results of later races after information concerning the same is received by plaintiff over the United Sports Printer. The results are transcribed on an average of five or ten minutes after they are received by plaintiff over the United Sports Printer.

8. The recorded racing information as hereinabove described is available daily without charge, and may be obtained by any person who telephones WEbster 9-1900. The aforesaid exchange is listed in the Chicago Telephone directory and is serviced by and consists of 70 trunk lines. This is the only manner in which any facilities of Telephone Company are employed by plaintiff for dissemination of the aforedescribed racing information.

9. Plaintiff's only source of income for the aforedescribed services in the operation of its business is derived from payments received from Illinois Sports News of $600 per week. Said payment is for spot advertising commercials, which messages are transcribed on the same recordings which disseminate the results and mutuel price paid by the winning horse as aforesaid.

10. Plaintiff's facilities were utilized by LeRoy Retelle of Lansing, Michigan from May of 1960 until October of 1961 on the average of six days a week. During that time Retelle was engaged in the business of receiving wagers or bets on horse races as an agent of one, Maurice Ramont. He telephoned WEbster 9-1900 either from pay telephones in and about Lansing, Michigan, or from his residence telephone IVanhoe 4-9617. Information obtained by Retelle pursuant to such calls was used by him in connection with the receiving and paying off of bets on horse races.

11. Neither plaintiff nor its employees accepts bets or wagers either by telephone or telegraph or otherwise.

12. The general regulations of the Illinois Bell Telephone Company applicable to general local exchange tariffs provide in part as follows:

Use Of Service For Unlawful Purposes—The service is furnished subject to the condition that it shall not be used for the purpose of making or accepting bets, furnishing information, or for any other purposes in connection with any gambling scheme, business or device, or for any similar unlawful purpose. Any subscriber whose service is to be discontinued or any applicant to whom service is to be denied under this regulation will be notified by the Telephone Company of his right to a hearing by the Illinois Commerce Commission to determine whether or not such service is being used or will be used in violation of this rule. Upon complaint to the Commission by any applicant or subscriber who is affected by the refusal or discontinuance of service in accordance with this rule, such service will be provided, continued or restored if the Commission shall determine that the service has not been used or is not intended to be used in violation of this rule.

13. The general regulations of the American Telephone and Telegraph Company applicable to message toll telephone service provide, in part, as follows:

Use of Service For Unlawful Purposes—The service is furnished subject to the condition that it will not be used for an unlawful purpose.

14. The facilities of the Telephone Company are indispensable to the operations of plaintiff's business and the discontinuance of such services would force plaintiff out of business.

15. Under date of April 25, 1962, the United States Department of Justice, over the signature of Herbert J. Miller, Jr., Assistant Attorney General, wrote to the Telephone Company as follows:

"Mr. Floyd Brown
Security Department
Illinois Bell Telephone Company
212 West Washington Street
Chicago 6, Illinois

Dear Mr. Brown:

"Information in the files of the Department of Justice reveals that the telephone facilities located at the following place are being and will be used for the transmission and receiving of gambling information in interstate commerce in violation of Federal law:

Telephone News System, Incorporated
81 West Van Buren Street
Chicago, Illinois
(WEbster 9-1900)

Pursuant to the provisions of subsection (d) of Section 1084 of Title 18, United States Code, you are therefore required to discontinue the leasing of said facilities, after reasonable notice to the subscriber.

In my judgment five days notice constitutes reasonable notice under the circumstances."

16. Under date of April 27, 1962, the Telephone Company, over the signature of F. H. Brown, Chief Special Agent, wrote to plaintiff as follows:

"Telephone News System, Incorporated
81 West Van Buren Street
Chicago, Illinois

Gentlemen:

"We have received a letter from the United States Department of Justice, acting under Title 18 of the U.S. Code, Section 1084 (d), requiring us to discontinue service on the telephone facilities furnished to you at 81 West Van Buren Street, Chicago, Illinois, after reasonable notice to you.

It is our present intention to comply with this letter at 9 A.M., C.D.T., on May 5, 1962."

Conclusions of Law.

1. Plaintiff's activities violate the provisions of Illinois Revised Statutes, Chapter 38, Section 28-1(a) (10).

2. Plaintiff's activities do not violate the provisions of Section 1084(a), Title 18, U.S.C.

3. Plaintiff's activities are within the ambit of Section 1084(d), Title 18, U.S.C.

4. A substantial question as to the constitutionality of Section 1084(d), Title 18, U.S.C. is raised and, pursuant to the provisions of Title 28 U.S.C. Sections 2282 and 2284, a three judge District Court should be convened to determine the constitutionality of such section.

OPINION

Plaintiff in this action seeks an injunction prmanently restraining Telephone Company from discontinuing, disconnecting or otherwise terminating the telephone facilities heretofore furnished by such defendant to plaintiff. Upon petition of the plaintiff and with the consent of the defendant and the defendant-intervenor, United States of America, the Court has heretofore entered a temporary restraining order pending determination of the plaintiff's prayer for a permanent injunction.

In support of its request for a permanent injunction, plaintiff makes two principal contentions:

1. That its activities do not violate any Federal, State, or local law and that therefore the provisions of Title 18 U.S.C. Section 1084(d) are inapplicable to it; or

2. That, if it be determined that the provisions of such section are applicable to it, the Section in question is invalid in that it is contrary to the First and Fifth Amendments to the Constitution of the United States.

The government, as defendant-intervenor, on the other hand, contends:

1. That the activities of the plaintiff do violate certain Federal and State laws, to wit—

(a) Chapt. 38, Illinois Revised Statutes, Section 28-1(a) (10);

(b) Title 18, U.S.C., Section 1084(a);

(c) Title 47, U.S.C., Section 501.

2. That the provisions of Section 1084(d) in their application to the plaintiff are valid and not in violation of either the First or Fifth Amendments to the Constitution of the United States.

Defendant Telephone Company takes no position with respect to whether or not the activities of plaintiff violate any Federal, State or local law but asserts simply that if it be found that they do, the procedures established by Section 1084(d) of Title 18 do not violate constitutional due process. That section, under which the Department of Justice demanded of the defendant Telephone Company that it terminate the services being rendered to plaintiff and pursuant to which such defendant notified plaintiff of its intention to discontinue such services, reads as follows:

> (d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored.

For the reasons set forth in the Court's opinion in *Kelly, et al.* v. *Illinois Bell Telephone Company, et al.*, decided earlier today, it is held that the burden of proof in this action rests with the defendant and the defendant-intervenor and that the standard of proof required *is a preponderance of the evidence.*

Similarly, as in that case, the first question to be determined is whether the record before this Court establishes by a preponderance of the evidence that the plaintiff is guilty of violating some Federal, State or local law so that the sanctions of Section 1084(d) of Title 18 may properly be applied to it.

The first such law urged by the government is Section 28-1(a) (10) of the Illinois Criminal Code of 1961. This provision, which became effective January 1, 1962, provides that a person commits illegal gambling when he—

> Knowingly transmits information as to wagers, betting odds or changes in betting odds by telephone, telegraph, radio, semaphore or similar means; or knowingly installs or maintains equipment for the transmission or receipt of such information.

It is the government's contention that the information transmitted by plaintiff over its 70 trunk telephone lines regarding winners and wagering results constitutes "information as to wagers, betting odds or changes in betting odds" within the meaning of Section 28-1(a) (10). The plaintiff contends that a proper interpretation of the statute would limit its application to "rapid" or "fast" transmission of information as to the odds on the various horses at the track as determined by the money wagered there and the changes which occur in those track odds from the time the betting is opened on a particular horse race until the mutuel windows are closed. The plaintiff contends that its transmission of information as to the names of the horses finishing first, second and third in any given race and the odds paid at the track on the winning horse, which information is transmitted at least twelve or more minutes after the conclusion of the race, does not constitute such rapid communication as is encompassed by the section in question.

"Fast" or "rapid" are of course relative terms. It is a matter of record, as disclosed by plaintiff's exhibits C and

D received in evidence, that the interval between races at the various horse race tracks throughout the United States is normally at least twenty or more minutes. At many tracks, the races are scheduled to start at half-hour intervals.

The parties have stipulated and the Court has found that the information as to race results is customarily received by plaintiff over its leased United Press International Sports Printer between twelve and thirty minutes after the conclusion of the race and is transcribed by plaintiff and transmitted to persons calling its telephone number, WEbster 9-1900, on an average of five or ten minutes after receipt.

Under the circumstances, it would appear that plaintiff's transmission is relatively fast or rapid and, on that score at least, is within the scope of Section 28-1 (a) (10).

The Court has already indicated in its opinion in the *Kelly* case that a reasonable construction of the section also requires that it be limited to the transmission of gambling activities. In contrast to the record in the *Kelly* case, in which there is no evidence that the transmission by telephone or telegraph of information by plaintiffs was directly or indirectly related to illegal gambling activities, the only evidence on the subject in the instant case indicates that the telephone information service furnished by plaintiff was in fact used by one Retelle, a professional gambler and bookmaker in Lansing, Michigan. Moreover, while it was stipulated that plaintiffs' publications in the *Kelly* case were sold at race tracks in the Chicago area and used in connection with legal gambling activities, there is no evidence in the record in the instant case to indicate any legal use of plaintiff's information service. It is obvious that a person placing a legal bet at a race track has no need to ascertain the results of the race by resort to plaintiff's facilities.

The plaintiff also contends that the information transmitted by it does not constitute "information as to wagers, betting odds or changes in betting odds" within the meaning of Section 28-1(a)(10). In this connection, it points

out that the only information which it furnishes in its telephone service is the names of the horses finishing first, second and third in any given race and the price or odds paid at the track for a bet placed on the winning horse. The government, on the other hand, contends that information as to the price or odds paid on the winning horse constitutes information as to wagers as well as information as to betting odds within the meaning of the section.

In this regard, reference to the statement of the Joint Committee which drafted the revised Illinois Criminal Code is helpful. The report of that committee indicates that it intended to make it an offense "knowingly to transmit betting information over the telephone" and that it was designed "to reach middlemen, agents and other participants in the gambling racket who might not technically qualify as offenders under other subsections of the article." The information transmitted by plaintiff certainly is "betting information" and would appear to be within the purview of the section in question.

Under the circumstances, it is the opinion of the Court that the transmission of information by plaintiff of the nature and within the time heretofore indicated through the 70 telephone lines leased by it from the Telephone Company is in violation of the provisions of Section 28-1 (a)(10) of the Illinois Criminal Code of 1961.

The first Federal statute alleged to be violated by plaintiff is Section 1084(a) of Title 18, United States Code, which reads as follows:

> (a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to

> receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

For the reasons set out in the Court's opinion in the *Kelly* case, it is held that the plaintiff is not "engaged in the business of betting or wagering". Accordingly, its activities are not in violation of the provisions of Section 1084(a) of Title 18 U.S.C.

The other Federal statute cited by the government is Section 501 of Title 47 which provides—

> Any person who wilfully and knowingly . . . causes or suffers to be done any act . . . in this chapter prohibited . . . shall upon conviction thereof be punished . . . by a fine of not more than $10,000 or by imprisonment for not more than one year . . .

It is settled that when a subscriber uses a telephone facility for purposes which constitute a violation of applicable State laws, he causes the utility to supply service prohibited under its tariff, *McBride* v. *Western Union Telegraph Company*, 9 Cir., 1948, 171 F. 2d 1. There is, however, no evidence in the record before the Court which discloses any intent on the part of plaintiff "wilfully and knowingly" to cause or suffer to be done any act prohibited in Title 47. *Pugach* v. *Klein*, D.C.SD.N.C. 1961, 193 F. Supp. 630. It thus appears that the provisions of Section 501 of that Title cannot be invoked herein to support the government's position.

In summary, plaintiff's activities are found to be in violation of Section 28-1(a)(10) of the Illinois Criminal Code and the provisions of Section 1084(d) of Title 18 U.S.C. are therefore applicable to it.

We come then to the second of plaintiff's contentions, namely, that if it be determined that the provisions of Section 1084(d) are applicable to it, the section is invalid and unconstitutional. The first question raised by this

contention is whether or not this Court, sitting alone, has the power to determine the constitutional issue. Section 2282, Title 28 U.S.C., provides:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title.

The mere assertion of the unconstitutionality of a Federal statute does not in and of itself require submission of the issue to a three judge court under the section in question. *Jasper* v. *Sawyer*, D.C.D.C. 1951, 100 F. Supp. 421. If, however, a substantial Federal constitutional question is presented, a three judge court must be convened. *Wicks* v. *Southern Pacific Co.*, 9 Cir., 1956, 231 F. 2d 130, cert. denied, 351 U.S. 946; *Anderson* v. *A. & W. Tractor Products*, S.D. Ill. 1960, 181 F. Supp. 90.

The statute here in question is a new one, having been passed by the Congress in the fall of 1961. The constitutionality of the procedure contemplated by Section 1084(d) has not, so far as this Court is aware, been considered by any other Federal Court. Therefore, in the opinion of the Court, the statute raises substantial constitutional questions. Accordingly, the Court will proceed in initiate the convening, pursuant to the provisions of Section 2284, Title 28 U.S.C., of a three judge District Court to consider the constitutional objections raised by plaintiff to the application of the statute in question to it.

Final disposition of the plaintiff's petition for a permanent injunction will be deferred pending such determination.

APPENDIX B.

TELEPHONE NEWS SYSTEM, INC., an Illinois corporation,

Plaintiff,

v.

ILLINOIS BELL TELEPHONE COMPANY, an Illinois corporation,

Defendant,

UNITED STATES OF AMERICA,

Defendant-Intervenor.

Civ. A. No. 62 C 941.
United States District Court
N. D. Illinois, E. D.

August 14, 1963

Before HASTINGS, *Circuit Judge* and JULIUS J. HOFFMAN and WILL, *District Judges*.

JULIUS J. HOFFMAN, *District Judge*. Since 1956, plaintiff, Telephone News Systems, Inc., has operated a telephone service supplying certain horse racing information to anyone calling its telephone number. Plaintiff receives the information over a "Sports Printer" leased from United Press International News Service and makes voice recordings several times a day, which recordings are heard by those calling plaintiff's number. (See *Telephone News System, Inc.* v. *Illinois Bell Tel. Co.*, 210 F. Supp. 471 (N.D. Ill. 1962), an earlier opinion in this case.)

On April 25, 1962, Herbert J. Miller, Jr., Assistant Attorney General in charge of the Criminal Division of the Department of Justice, sent a letter to the Illinois Bell Telephone Company representing that information in the

files of the Department of Justice revealed that telephone facilities located at plaintiff's place of business were being and would be used for transmitting and receiving gambling information in violation of federal law. The letter stated that pursuant to title 18 U.S.C. § 1084(d), the telephone company was required to discontinue the leasing of these facilities, after reasonable notice to the subscriber; it suggested that 'five days' notice would constitute reasonable notice under the circumstances. On April 27, 1962, the telephone company notified plaintiff by letter that in compliance with the Department of Justice directive, plaintiff's telephone service would be discontinued on May 5, 1962. Plaintiff instituted this proceeding on May 4, 1962, praying that the Illinois Bell Telephone Company be enjoined from discontinuing service to plaintiff. The United States of America, alleging that it is the real party in interest, has been allowed to intervene as a defendant. Pending a final determination of plaintiff's prayer for a permanent injunction, this Court entered a temporary restraining order preventing removal of plaintiff's telephone facilities.

The case was submitted to the Court on the pleadings, stipulations of facts, and documents admitted into evidence. After hearing arguments and examining the briefs filed by counsel, the Honorable Hubert L. Will found that plaintiff was using its telephone facilities in violation of section 28-1(a)(10) of the Illinois Criminal Code of 1961, Ill. Stat. Ann. c. 38, § 28-1(a)(10) (1961), and that consequently discontinuation of its telephone service was required by title 18 U.S.C. § 1084(d). *Telephone News System, Inc.* v. *Illinois Bell Telephone Co., supra.* The Court further determined, however, that plaintiff had raised a substantial question concerning the constitutionality of section 1084(d) and, pursuant to title 28 U.S.C. § 2882, 2284, directed that a three-judge court be convened to consider the constitutional objections raised by plaintiff.

Section 1084(d) provides as follows:

> "When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of any such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored."

Section 28-1(a)(10) of the Illinois Criminal Code provides that a person commits illegal gambling when he

> "knowingly transmits information as to wagers, betting odds, or changes in betting odds by telephone, telegraph, radio, semaphore or similar means; or knowingly installs or maintains equipment for the transmission or receipt of such information."

Plaintiff contends that both of these provisions violate the United States Constitution.

I. Constitutionality Of § 1084(d)

The plaintiff asserts that section 1084(d) is unconstitutional (1) because of vagueness, (2) because it authorizes the prosecution of crimes under the guise of a civil remedy, and (3) because it deprives the telephone subscriber of its remedies for wrongful termination of service.

1. *Contention That Provision Is Void Because of Vagueness.*

Plaintiff contends that section 1084(d) creates a hitherto unknown offense of transmitting or receiving "gambling information" over wire communication facilities, and that neither the section itself nor the statute as a whole supplies any standards for determining what constitutes "gambling information," but delegates the definition of this term to the agencies charged with enforcement of this provision. Plaintiff, quoting from, *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926), asserts that "men of common intelligence must necessarily guess at its meaning and differ as to its application." Plaintiff asserts that the term can include almost any type of information, including, for example, the physical condition of a hockey team, the weather conditions on the day of a football game, or "stale" information about a sporting event or contest.

A statute is void where it is so vague as to embrace acts which it is unreasonable to presume were intended to be made subject to its sanctions. *Cf. Herndon* v. *Lowry*, 301 U.S. 242, 258-59 (1937). The difficulty with plaintiff's argument is that plaintiff incorrectly assumes that section 1084(d) creates an offense of transmitting or receiving gambling information in interstate or foreign commerce. This provision, however, creates no offense. Whether the transmission or receiving of information about the weather or the physical condition of a team prior to a sporting event is a crime under given circumstances is to be determined not by reference to the term "gambling information" in this provision, but by reference to federal, state, and local criminal laws which proscribe the sending or receiving of gambling information over wire communications facilities. Section 1084(d) provides for discontinuation of communication services that are put to certain unlawful uses.

The fifth amendment forbids the taking of property without due process of law. It seems probable that one's

right to telephone service is a property right within the protection of this amendment, inasmuch as under the common law and most utility statutes a public utility must serve all members of the public without unreasonable discrimination. See *Andrews* v. *Chesapeake & Potomac Tel. Co.*, 83 F. Supp. 966 (D.D.C. 1949); *Fay* v. *Miller*, 183 F. 2d 986 (D.C. Cir. 1950). The requirement of due process includes the requirement that a statute penalizing conduct must give fair notice of what conduct is proscribed, or it is void for "indefiniteness." *Winters* v. *New York*, 333 U.S. 507, 524 (1948) (Frankfurter, *J.*, dissenting).

The concept of vagueness or indefiniteness is most often employed with respect to criminal provisions. The requirement as applied to a criminal statute has been described by the United States Supreme Court, in a frequently quoted passage, as follows:

> "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340 (1952). (Footnotes omitted.)

With regard to non-criminal provisions, the Court has said, "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanctions for enforcement." *Winters* v. *New York*, 333 U.S. 507, 515 (1948).

In examining a statutory provision challenged as vague and indefinite, the federal courts must determine whether the provision contains sufficient standards to identify the conduct to which the penalty applies, and in so doing the court is guided by the provision itself as read in the context of the entire statute, and by the nature of the subjects with which the statute is concerned. *Connally* v. *General Construction Co.*, 269 U.S. 385, 391-92 (1926). Moreover, the court, in maintaining a proper perspective of its role in the review of legislation challenged as unconstitutional, must appreciate that the drafting of legislation calls for a type of judgment "peculiarly within the responsibility and the competence of legislatures." *Winters* v. *New York*, 333 U.S. 507, 526 (1948) (Frankfurter, *J.*, dissenting). Accordingly, the language of Congress is not easily held "indefinite." It is appropriate to consider what problem Congress was dealing with, in enacting the provision in question, and why Congress chose the language enacted. *Cf.*, *Boyce Motor Lines*, v. *United States*, 342 U.S. 337, 341-42 (1952).

Section 1084(d) gives fair notice of the type of conduct which will give rise to the discontinuation of telephone service. It contains sufficient standards to show what type of criminal offense will give rise to its application.

The statute in which subsection (d) appears provides some indication of what Congress had in mind in using this term. Subsection (a) of Section 1084 provides as follows:

> "Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both."

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In this subsection, Congress gave a specific example of the kind of criminal offense it meant to comprise in subsection (d).

Subsection (b) of this section specifically exempts certain types of transmissions—those of information for use in news reporting and those sent from a state where the betting is legal to another state where betting is legal.

The legislative history of section 1084 clearly shows the evil which Congress meant to suppress by this provision. The House Committee on the Judiciary reported, with respect to this section, as follows:

> "Testimony before your Committee on the Judiciary revealed that modern bookmaking depends in large measure on the rapid transmission of gambling information by wire communication facilities. For example, at present the immediate receipt of information as to results of a horserace permits a bettor to place a wager on a successive race. Likewise, bookmakers are dependent upon telephone service for the placing of bets and for layoff betting on all sporting events. The availability of wire communication facilities affords opportunity for the making of bets or wagers and the exchange of related information almost to the very minute that a particular sporting event begins."

The Committee further stated,

> "The purpose of the bill is to assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce."

H.R. Rep. No. 967, 87th Cong., 1st Sess. (1961).

Thus, the principal problem with which Congress was dealing was the suppression of professional gambling activities. It has often been stressed in recent years that

the threat of organized crime is difficult to combat on the state or local level, because it frequently crosses jurisdictional lines. Johnson, *Organized Crime: Challenge to the American Legal System* (*Part I*), 53 J. Crim. L., C. & P.S. 399, 418-19 (1962). And its communications are often beyond the reach of state and local law enforcement, because they are frequently interstate. *Id.*, (*Part II*), 54 J. Crim. L., C & P.S. 1, 27 (1963). Organized gambling, particularly bookmaking, is highly dependent upon rapid communications. ABA Report on Organized Crime and Law Enforcement 84 (1952); Bachelder, *The Suppression of Bookie Gambling by a Denial of Telephone and Telegraph Facilities*, 40 J. Crim. L., C. & P.S. 176 (1949). Thus Congress considered that denial of wire communication facilities to support such gambling activities would be an effective way to support such gambling activities.

The states, as well as the federal government, have employed regulation of communication facilities as a means to curtain professional gambling activities, particularly off-track betting, and a number of states have enacted statutes or adopted administrative procedures to prohibit the transmission of information with intent that it be used in a gambling operation, to ban racing information for a given period of time after a race, or to deny wire services where the services are used to further commercial gambling activities. Johnson, (*Part II*), *supra* at 27; Bachelder, *supra*.

In light of the history of this effort to combat professional gambling activities, the language of subsection (d) clearly identifies the type of federal, state, or local criminal offense meant to be included. With due regard to the context of the statute, the nature of the subject matter dealt with, and the history of the legislation, we may say that facilities are used to transmit or receive information in violation of federal, state, or local law, when those facilities are used in violation of a federal, state, or local law which proscribes the transmitting or receiving of information relating to or assisting in the placing of bets or wagers.

It is difficult to conceive of a criminal statute which would not clearly fall within or without subsection (d), and while plaintiff has referred to types of *information* which might or might not be "gambling information," it has not referred to any type of *statute* which might or might not proscribe the transmission or receiving of gambling information. We therefore conclude that section 1084(d) is sufficiently precise in its terms to satisfy the constitutional requirement of definiteness.

Plaintiff has further contended that incorporation by reference of laws not yet enacted is fatal to the provision. Plaintiff cites certain state decisions in support of this contention, but the federal rule is that legislative imposition of sanctions for conduct proscribed by other legislation, including legislation subsequently enacted, does not violate the constitutional requirement of due process. *United States* v. *Sharpnack*, 355 U.S. 286 (1958).

2. *Contention That § 1084 (d) Authorizes the Prosecution of a Crime Under the Guise of a Civil Remedy*

Plaintiff makes a three-pronged argument that section 1084 (d) authorizes governmental prosecution of crimes in civil proceedings: (1) it contends that the procedure authorized by section 1084 (d) results in the denial to plaintiff of its privilege against self-incrimination; (2) it contends that section 1084(d) imposes penal sanctions without the constitutional procedures required for conviction of a crime; and (3) it contends that section 1084 (d) provides for the trial of federal crimes in state courts.

(a) With regard to the first of these contentions, plaintiff maintains that section 1084 (d) places one threatened with discontinuation of telephone service upon the horns of a dilemma: he must either suffer discontinuation of his service, or he must file a petition under oath in order to prevent discontinuation. The affected subscriber, plaintiff claims, is therefore denied his privilege against self-incrimination.

There are two short answers to this contention. First, plaintiff is a corporation, and it is well settled that a corporation is not protected by the privilege against self-incrimination. *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186 (1946); *Wilson* v. *United States*, 221 U.S. 361 (1911). Second, the procedures followed by the courts in section 1084 (d) cases assure against violation of the privilege. The plaintiff, to challenge the threatened discontinuation, must file a complaint in the federal or state court; but there is no requirement that the complaint make reference to any fact which would indicate that the plaintiff had transmitted or received gambling information in violation of federal, state, or local law. The complaint need only set forth the threatened termination of facilities and assert its right to telephone service. The defendant in this type of proceeding bears the burden of proof, and it must establish, by a preponderance of the evidence, that the service has been used in violation of the law. *Fay* v. *Miller*, 183 F. 2d 986 (D.C. Cir. 1950); *Andrews* v. *Chesapeake & Potomac Tel. Co.*, 83 F. Supp. 966 (D.D.C. 1949). In the proceeding at bar, the trial court placed this burden upon defendant and defendant-intervenor. *Telephone News System, Inc.* v. *Illinois Bell Tel. Co.*, 210 F. Supp. 471 (N.D. Ill. 1962). Consequently, plaintiff is at no point required to come forward with evidence, much less testimony, until defendant has satisfied this burden. Even then, a plaintiff is not required to take the stand or otherwise incriminate himself.

Under these circumstances, no deprivation of the privilege against self-incrimination arises from the necessity for the plaintiff to file a complaint in order to protect its right to telephone service.

(b) With regard to the second contention, plaintiff maintains that section 1084 (d) imposes penal sanctions without permitting the affected subscriber the benefit of those constitutional procedures required to be followed for conviction of a crime. Plaintiff contends that section 1084 (d) is a punitive provision, under which discontinuation of one's telephone service upon a determination by

a law enforcement agency that he has violated a federal, state, or local criminal law is a penalty for such violation. Plaintiff asserts that, consequently, the statute deprives it of the procedural safeguards guaranteed one accused of a crime by the fifth and sixth amendments.

In urging that section 1084(d) violates the fifth and sixth amendments, plaintiff relies primarily on *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144 (1963). In that case the United States Supreme Court invalidated a section of the Immigation and Nationality Act of 1952 and its predecessor section in the Nationality Act of 1940 on the ground that the legislation was punitive in character. The sections in question automatically divested an American of his citizenship for leaving or staying outside the country to avoid the draft. The Court stated its conclusions as follows:

> "Independently of prosecution, forfeiture of citizenship attaches when the statutory set of facts develops. It is argued that the availability after the fact of administrative and judicial proceedings . . . to contest the validity of the sanction meets the measure of due process. But the legislative history and judicial expression with respect to every congressional enactment relating to the previsions in question dating back to 1865 establish that forfeiture of citizenship is a penalty for the act of leaving or staying outside the country to avoid the draft. This being so, the Fifth and Sixth Amendments mandate that this punishment cannot be imposed without a prior criminal trial and all its incidents, including indictment, notice, confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses. If the sanction these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further." 372 U.S. at 167.

Plaintiff asserts that the sanction imposed here, like that involved in *Mendoza-Martinez,* is plainly punishment. Plaintiff, argues that because the statute, by its terms,

conditions imposition of the sanction upon violation of a criminal law, and because the sanction itself—deprivation of property—is necessarily punitive, the statute is clearly penal in character.

That a sanction is conditioned upon the criminality of the behavior involved is not determinative of the question whether a provision is penal. *Murphy* v. *United States*, 272 U.S. 630, 632 (1926). *Cf. De Veau* v. *Braisted*, 363 U.S. 144, 160 (1960) (opinion of Frankfurter, J.) (regulation of crime on the waterfront through disqualification of ex-felons from holding union offices); *Barsky* v. *Board of Regents*, 347 U.S. 442 (1959) (regulation of medical profession by suspension of physicians convicted of any crime). See also *United States* v. *Constantine*, 296 U.S. 287 (1935), where the Court deemed it significant that imposition of a tax was conditioned upon criminal conduct, but held the tax to be punitive because, in addition, the tax was clearly excessive in relation to the revenue purpose assigned. Where the purpose of the sanction is preventive (as here), rather than to provide additional punishment for criminal conduct, the sanction is not penal in character. *Murphy* v. *United States, supra.*

Neither is it determinative that the sanction involves the deprivation of property. For example, the forfeiture of property used in violation of federal criminal law is not a criminal sanction. See *United States* v. *One Ford Coupe Automobile*, 272 U.S. 321, 328 (1926); *Dobbins Distillery* v. *United States*, 96 U.S. 395 (1878).

The governing inquiry on the issue of the civil or penal character of a provision is whether the legislative aim in providing the sanction was to punish the individual for engaging in the activity involved or to regulate the activity in question. *Kennedy* v. *Mendoza-Martinez*, *supra*; *Flemming* v. *Nestor*, 363 U.S. 603 (1960). Congressional intent in this matter is to be established by the "objective manifestations of congressional purpose" as revealed by the legislative history of the act, and "Absent conclusive evidence of congressional intent as to the penal nature of a statute, . . . [certain] factors must be considered in rela-

tion to the statute on its face." *Kennedy* v. *Mendoza-Martinez*, *supra* at 169. In describing these factors, the Court, in *Mendoza-Martinez*, stated as follows:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions." 372 U.S. at 168-69 (Footnotes omitted.)

A final guide in the inquiry into congressional purpose is the principle that "unmistakable evidence of punitive intent . . . is required before a Congressional enactment of this kind may be struck down." *Flemming* v. *Nestor*, *supra* at 619. In *Flemming*, the Court stated that,

> "It is thus apparent that, though the governing criterion may be readily stated, each case has turned on its own highly particularized context. Where no persuasive showing of a purpose 'to reach the person, not the calling,' *Cummings* v. *Missouri*, *supra*, [4 Wall. 277] at 320, has been made, the Court has not hampered legislative regulation of activities within its sphere of concern, despite the often-severe effects such regulation has had on the persons subject to it." *Id.* at 616.

The first matter to be consulted, legislative history, in no way suggests that Congress meant for continuation of telephone service to be a penalty for the violation of a criminal law. To the contrary, we have already shown that the congressional aim in enacting this provision was to curtail professional gambling activities—particularly bookmaking—by depriving those engaged in such activities of the rapid wire communications facilities necessary to

their operation. An additional purpose was to aid the states in their efforts to prevent the use of such facilities for the transmission of gambling information.

Section 1084(d), as originally reported to the Senate, effected its purpose by penalizing the use of or the leasing, furnishing, or maintaining of wire communication facilities with the intention that they be used for transmitting bets or wagers. However, subsection (a) of the statute was amended so as to prohibit only the use of such facilities by persons engaged in the business of betting or wagering "in the belief that the individual user, engaged in the business of betting or wagering, is the person at whom the proposed legislation should be directed." S. Rep. No. 588, 87th Cong. 1st Sess. p. 2 (1961). The act was also amended to add subsection (d), "which the committee believes will provide additional assistance to the States in preventing the transmission of gambling information." *Ibid.*

These expressions of legislative intent clearly establish that the statute was directed at the use of telephone service for professional gambling operations. Only the gambler-users are directly penalized under section 1084(a), and it is their activities, their use of the telephone, that section 1084(d) attempts to curtail. Subsection (d) supplements the effort made in subsection (a) to prevent the use of wire facilities for criminal purposes by persons engaged in betting or wagering, the persons "at whom the proposed legislation should be directed." Subsection (d) is a substitute for that portion of the originally proposed subsection (a) that penalized telephone companies for knowingly leasing, furnishing, or maintaining wire communication facilities for gambling purposes, and it is designed to avoid the use of the telephone for such purposes without penalizing the telephone company. Its object is the curtailment of the business of betting or wagering.

Plaintiff is not a person engaged in the business of betting or wagering. *Telephone News System, Inc.* v.

Illinois Bell Tel. Co., supra at 477. But plaintiff provides a service useful to persons engaged in the business of betting or wagering, and by restricting plaintiff's use of the telephone, the government restricts activities on which "modern bookmaking depends." Plaintiff sustains a loss by reason of the restrictions, but the person aimed at is the bookmaker, not the plaintiff. Plaintiff's loss is incidental to the suppression of the business of betting and wagering that is the intent of the statute.

It thus appears that the purpose of section 1084(d) is not penal but regulatory. Its object is the suppression of gambling by elimination of rapid transmission of gambling information essential to modern bookmaking: Its focus is regulation of the use of the telephone for the transmission of gambling information. The loss sustained by plaintiff is a relevant incident to the regulation of activities which are the real object of the legislation. Accordingly, it cannot be said that the statute is penal in intent: "Where the source of legislative concern can be thought to be the activity . . . from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected." *Fleming* v. *Nestor, supra* at 614.

As the legislative history establishes the non-penal aim of subsection (d), it is unnecessary to make a detailed analysis of those factors to be considered absent such a clear intent. It is appropriate to note summarily, however, that the discontinuation of telephone service is not an "affirmative disability or restraint"; it is not historically regarded as punishment; it is not meant to promote retribution and deterrent, but to prevent the continued use of communications to facilitate professional gambling activities; it has an "alternative purpose" and does not appear to be excessive in relation to that purpose. Moreover, although the behavior to which it applies is already a crime, the purpose of the sanction is to prevent continued transmission of information useful to bookmakers rather than to provide an additional penalty for the violation of law.

Finally, we are unable to discover any persuasive indication that Congress's aim in enacting subsection (d) was penal, much less that "unmistakable evidence of punitive intent" required to strike down a congressional enactment on that ground.

In presenting its contentions regarding the alleged penal character of subsection (d), plaintiff has placed great emphasis upon the active role of the government in this case, which, in seeking permission to intervene in this action, asserted that it was the "real party in interest." We do not see how the government's participation in this proceeding, together with its role in advising the telephone company of its duty to withdraw service to the plaintiff, establishes the penal character of the provision or of this action.

It is helpful to consider the background of public utility law and practice against which this provision was enacted. Although the procedures authorized by subsection (d) may be new to the federal statutes books, they are not new in the public utility field.

It has long been held that the customer's right to service from a public utility is conditioned upon his lawful use of the service. See, *e.g.*, *Bryant* v. *Western Union Tel. Co.*, 17 Fed. 825 (D. Ky. 1883); *Godwin* v. *Carolina Tel. & Tel. Co.*, 136 N.C. 258, 48 S.E. 636 (1904); Bachelder, *supra* at 179. The utility has a right to withdraw service to prevent illegal use of its facilities, *McBride* v. *Western Union Tel. Co.*, 171 F.2d 1 (9th Cir. 1948), and some courts have spoken of a duty on the part of the utility to do so, see, *e.g.*, *Hamilton* v. *Western Union Tel. Co.*, 34 F. Supp. 928, 929 (N.D. Ohio 1940); *Andrews* v. *Chesapeake & Potomac Tel. Co.*, 83 F. Supp. 966, 968 (D.D.C. 1949).

The practice in a number of states has long been that the utility discontinues service upon notification by the police that the service is being illegally used, and the police then present their evidence, on behalf of the company, in the proceeding brought by the customer to restore service or prevent threatened discontinuance. Bachelder,

supra at 180-81. Western Union, AT&T, and the Bell System companies all have tariff provisions that service will not be furnished if a law enforcement agency advises that the service is being or will be used in violation of law, or if the company receives other evidence that the service is being or will be so used. *Id.* at 178-79. In *McBride* v. *Western Union Telegraph Co.*, 171 F.2d 1 (9th Cir. 1948), it was held that the company, under such a tariff, could discontinue service, upon notification by a law enforcement officer of illegal use, and that the notifying officers need not supply the company with their evidence of illegal use before discontinuation would be justified. See, *contra*, *Andrews* v. *Chesapeake & Potomac Tel. Co.*, 83 F. Supp. 966, 968-69 (D.D.C. 1949) (dictum). And in *People ex rel. Restmeyer* v. *New York Tel. Co.*, 173 App. Div. 132, 159 N.Y.S. 369 (1916), the court stated: "It is certainly not an unlawful or oppressive use of police power to interrupt telephone service by arrangement between the police and the telephone company in a case where the telephone is being used, as it was in this case, to carry on a criminal business." 159 N.Y.S. at 370. *Accord*, *Fay* v. *Miller*, *supra*.

As has already been noted, where the customer brings a proceeding to restrain discontinuation, the defendant has the burden of establishing illegal use by a preponderance of the evidence. This procedure has been upheld on the ground that the action is not a criminal proceeding to punish the customer for past acts, but is an attempt by the company to prevent future improper use (as indicated by past use) of its property. See, *e.g.*, *In re DiBenedetto*, 83 N.Y.S. 2d 920 (S.Ct. 1948); *People ex rel. Restmeyer* v. *New York Tel. Co.*, *supra*.

We have observed that Congress wrote subsection (d) into section 1084 in order to accomplish the aim of curtailing illegal use of wire communication facilities for the transmission and receiving of gambling information without penalizing the telephone and telegraph companies. Consequently, that the subsection provides for an active role by law enforcement agencies and a passive role by

the utilities involved does not establish that the congressional intent was penal—to provide law enforcement agencies with a civil proceeding for the prosecution of a crime; rather, Congress had a non-penal reason for drafting subsection (d) as it did.

In the *Mendoza-Martinez* case the Court found conclusive evidence of a penal intent in the legislative history of the statute in question. Equally conclusive evidence of the penal character of section 1084(d) would have to be shown before plaintiff could prevail on this ground in the case at bar. "[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground." *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960). No such proof has been made in this proceeding.

(c) Plaintiff's third contention with regard to its argument that section 1084(d) authorizes the prosecution of a crime under the guise of a civil remedy is that this provision provides for the trial of federal crimes in state courts and state crimes in federal courts. Plaintiff asserts that the provision can result in a "hodge-podge" of the jurisdictional aspects of the courts and inquires whether the state courts may not be empowered to impose the fine or imprisonment provided by section 1084(d) upon a determination in a subsection (d) proceeding that subsection (a) has been violated.

It suffices to say with respect to this contention that, plainly, section 1084(d) does not authorize a state court to impose the penalties provided in subsection (a), nor does it authorize a federal court to impose the criminal penalties of state statutes; it does not result in criminal convictions; and thus it does not result in any unwarranted expansion of jurisdiction of either the state or the federal courts.

3. *Contention That § 1084(d) is Void Because of Elimination of Remedies*

Plaintiff contends that section 1084(d) is unconstitutional because it eliminates all remedies for the wrongful

termination of telephone service. The statute provides that ". . . no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency." It is clear that this provision eliminates any previously existing right of action for wrongful termination of service made in compliance with a notice from a law enforcement agency under section 1084(d).

The statute further provides for "reasonable notice to the subscriber" prior to discontinuation of service, and it specifies that "Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored." Plaintiff asserts, with respect to this portion of the provision, that since it does not guarantee by its terms the issuance of a temporary restraining order, it permits wrongful termination of service, for which the subscriber's only recourse would be to obtain the renewal of service and for which the subscriber could not obtain damages.

Plaintiff's contentions are inapposite in the case at bar. Plaintiff received notice of the threatened termination of telephone service and promptly instituted a proceeding before this court. Judge Will issued a temporary restraining order to prevent the discontinuation of service until the Court should determine whether such discontinuation was warranted. Consequently plaintiff has not suffered any deprivation of service of which it can complain.

It is both elementary and fundamental that a federal court has no jurisdiction to declare an act of Congress void unless the case before it calls for the application of a statutory provision which conflicts with the Constitution. This rule, first expressed in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) was applied in *United States* v. *Raines*, 362 U.S. 17 (1960), to reverse a district court determination that a provision of the Civil Rights Act of

1957, title 42 U.S.C. § 1971, was unconstitutional. The district court had ruled that the provision in question allowed the United States to enjoin purely private actions designed to deprive a person of his voting rights. In the controversy before the court, however, the United States was proceeding against state government officials. The Supreme Court, in reversing the lower court's ruling, refused to consider whether the statute could be constitutionally applied to the conduct of private persons, stating as follows:

> "The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them. This was made patent in the first case here exercising that power 'the gravest and most delicate duty that this Court is called on to perform.' [Holmes, J., in *Blodgett* v. *Holden*, 275 U.S. 142, 148] *Marbury* v. *Madison*, 1 Cranch 137, 177-180. This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal right of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered: one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *Liverpool, New York & Philadelphia S.S. Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39. Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. [Citations omitted.] In *Barrows* v. *Jackson*, 346 U.S. 249, this Court devel-

oped various reasons for this rule. Very significant is the incontrovertible proposition that it 'would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation.' *Id.*, 346 U.S. at page 256. The delicate power of pronouncing an Act of Congress unconstitutional is not be exercised with reference to hypothetical cases thus imagined." 362 U.S. at 20-22.

In accordance with these rules, this court will not pass upon the constitutionality of the application of section 1084(d) to hypothetical situations that might arise if a subscriber's service were wrongfully terminated or if a subscriber's prayer for a temporary injunction were denied and the court subsequently determined that termination was unwarranted. Neither situation is presented in the case at bar.

Plaintiff opposes application of these rules, relying upon *Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *Lovell* v. *City of Griffin*, 303 U.S. 444 (1938); and *Smith* v. *Cahoon*, 283 U.S. 553 (1931), to show that where a statute is void on its face, the court may pass upon its validity. These three cases, however, involved statutes requiring licenses, and the Court held in all three cases that since the defendants had been convicted and sentenced under the ordinances and statutes in question, they could challenge the validity of the provisions even though they had not sought and been refused the licenses before engaging in the proscribed conduct.

Where "weighty contervailing policies" are present, the federal courts have sometimes made exceptions to the rule of avoiding a constitutional question unless squarely presented in the case at hand. *United States* v. *Raines*, *supra* at 22-23. We find no such contervailing policy here. As the Court stated in *Raines*, "This case is rather the most typical one for application of the rules we have discussed." *Id.* at 24. The case may never arise where service is discontinued prior to a court's determination

of whether discontinuation is warranted, or where a court denies an application for a temporary injunction. To pass upon these situations would be to "anticipate a question of constitutional law in advance of the necessity of deciding it. . . ." *Liverpool, New York & Philadelphia S.S. Co.* v. *Commissioners of Emigration*, 113 U.S. 33, 39 (1885).

Even assuming, arguendo, that the question were properly before this court, we are of the opinion that this provision is consistent with the requirement of due process of law. It is not unreasonable or arbitrary, as plaintiff contends, and it does not deprive the affected subscriber of all remedies to protect against wrongful termination of service.

That this provision is not unreasonable or arbitrary is shown by the purpose behind its enactment. As discussed above, Congress first drafted this provision so as to authorize prosecution of public utilities for the knowing furnishing of communications facilities for gambling purposes. Congress redrafted the provision in order to insure that the utilities would not be penalized for termination of service, providing instead for reasonable notice of termination to the subscriber and expressly reserving to the subscriber his equitable remedy to prevent wrongful discontinuation. Compare the statute held unconstitutional in *Tollin* v. *Diamond State Tel. Co.*, 164 A.2d 254 (Del. Ct. of Ch. 1960). See also *Pike* v. *Southern Bell Tel. & Tel. Co.*, 263 Ala. 59, 81 So. 2d 254 (1955), where many of the state court decisions are reviewed in the majority and dissenting opinions.

The result of this provision is to eliminate the discretion of the utility in the effectuation of the provision. Because of the principle of sovereign immunity, the subscriber cannot obtain damages or other penalties from the government for improper action. But persons are frequently confronted by the limitations of sovereign immunity in their dealings with the government. Congress is empowered to regulate the area of interstate and

foreign communications, and we consider that it can effect this regulation by placing responsibility for preventing the unlawful use of communication facilities upon law enforcement agencies instead of upon the utilities, which are less well equipped to investigate and discover the illegal use of such facilities. It seems reasonable to protect the utilities from damage actions under these circumstances.

Plaintiff contends that under *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930), the deprivation of remedies provided in section 1084(d) is unconstitutional. In *Hill*, the plaintiff brought suit to enjoin the collection of property taxes, alleging that the assessment violated the equal protection clause of the constitution. In previous cases, the state courts had ruled that no administrative remedy was available and that injunctive relief was appropriate for the determination of the validity of such a claim. The state supreme court overruled the earlier cases, and it denied relief because the plaintiff had failed to seek its administrative remedy. The United States Supreme Court reversed, stating that "a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." 281 U.S. at 682.

It is apparent that the *Hill* case does not support the position taken by plaintiff in the case at bar. It is true that a telephone subscriber might be wrongfully deprived of telephone services under the statute either where he failed to bring an appropriate action to prevent termination of service or where such an action did not result in the entry of a temporary restraining order; however, if the telephone subscriber chooses to act promptly, actual termination of the service can be avoided prior to an adjudication on the merits. Reasonable notice of termination must be given by the telephone company under section 1084(d), and during the notice period proceedings may be initiated to prevent termination in a federal or state court or in a local tribunal or agency. The doors of the

courts are expressly opened for timely judicial intervention under the statute. Thus section 1084(d) does not deny the telephone subscriber a "real opportunity to protect" his rights. An adjudication on the merits will be had prior to termination, except in the rare case of error on the part of the court or tribunal in denying a temporary restraining order. We think that due process requires nothing more. In *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599 (1950), the Supreme Court held that a hearing prior to the seizure of misbranded drugs was not a requirement of due process, even though irreparable damage to a business might result from such a seizure. It is doubtful that irreparable damage would ever occur as a result of section 1084(d), as few damage actions are ever brought for wrongful termination of telephone service, "probably because the facilities for halting the discontinuation of service are so adequate that damages never accrue in sufficient quantity." Bachelder, *supra* at 181 n. 25.

II. CONSTITUTIONALITY OF § 28-1(a)(10) OF THE ILLINOIS CRIMINAL CODE

Plaintiff asserts that section 28-1(a)(10) of the Illinois Criminal Code is unconstitutional. Plaintiff contends that its telephone service cannot be discontinued under title 18 U.S.C. § 1084(d) where the state statute found to have been violated is void.

1. *Contentions That the Court Should Avoid the Constitutional Question*

(a) Defendant Illinois Bell Telephone Company urges that this court abstain from deciding the question of the constitutionality of section 28-1(a)(10). Under the doctrine of abstention, federal courts have frequently declined to exercise their jurisdiction in cases involving uncertain state laws when the resolution of a state issue might obviate the necessity for adjudication of a federal constitutional question. Note, *Judicial Abstention From the Exercise of Federal Jurisdiction*, 59 Colum. L. Rev.

749 (1959); Note, *Consequences of Abstention by a Federal Court*, 73 Harv. L. Rev. 1358 (1960). The procedure usually followed in the exercise of abstention is for the federal court to retain jurisdiction pending the determination of a state declaratory action, or other appropriate proceeding. See *e.g.*, *United Gas Pipe Line Co.* v. *Ideal Cement Co.*, 369 U.S. 134 (1962).

Abstention is often deemed appropriate where, as here, there is a possibility that the state supreme court would construe a state statute in such a way as to avoid federal constitutional objections. See, *e.g.*, *Harrison* v. *Nat'l Ass'n for the Advancement of Colored People*, 360 U.S. 167, 177 (1959). Thus, defendant Illinois Bell Telephone Company urges that this Court should abstain from considering plaintiff's challenge of the validity of section 28-1(a)(10) in view of the possibility that the Illinois Supreme Court might so construe this provision as to eliminate all constitutional doubts.

Recognizing that the United States Supreme Court has given increasing scope to the doctrine of abstention (see Notes, *supra*), we nevertheless consider that abstention would be inappropriate in the case at bar. Three considerations prompt this conclusion.

The first is the manner in which the state statute is involved in this proceeding. Section 28-1(a)(10) has been incorporated by reference into a federal statute. Of course, the Illinois Supreme Court's construction of this provision would be binding upon this court if such a construction had been made. But to delay this proceeding to await a state court interpretation would delay the operation of a federal statute. Such a delay, we consider, should be avoided, unless plainly required.

The second consideration is that a state court construction of the provision in question would be unlikely to shed light upon the issue at hand. Where there is slight chance that the result in the state court would be different from that in the federal court, abstention, with the substantial delay and expense resulting therefrom, is not required.

City of Chicago v. *Atchison, T. & S.F. Ry.*, 357 U.S. 77 (1958); *All American Airways* v. *Village of Cedarhurst*, 201 F.2d 273 (2d Circ. 1953). The Court stated in *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 188-89 (1959), that

> "The doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest."

Under these principles, we consider that the operation of a federal statute should not be delayed to permit a construction of state law by the state courts where it is doubtful that a state determination would differ from that of this Court. We agree with Judge Will's interpretation of the section at issue made in *Kelly* v. *Illinois Bell Tel. Co.*, 210 F. Supp. 456 (N.D. Ill. 1962), the companion case to this one, and in his opinion entered in this case, *Telephone News Service, Inc.* v. *Illinois Bell Tel. Co.*, *supra*. That interpretation, in which the provision was limited to avoid constitutional difficulties, was dictated by the legislative history of the statute and by the principle that a statute should be so construed as to uphold its validity. It is appropriate to assume that the Illinois courts will judge the statute in light of these same dictates. It is the policy of the Illinois courts to construe a statute so as to uphold its validity. See, *e.g.*, *Chicago* v. *Willett Co.*, 406 Ill. 286, 94 N.E. 2d 195, (1950), *vacated*, 341 U.S. 913 *clarified*, 409 Ill. 480, 101 N.E. 2d 205 (1951), *reversed on other grounds*, 344 U.S. 574 (1953). We thus conclude that there is no reasonable likelihood that a prior state court construction of section 28-1(a)(10) would alter the complexion of the issue before this Court.

The third consideration is that this Court does not rule that the Illinois statute is unconstitutional; rather, we

are upholding its validity. No precedent has come to our attention in which a federal court has refused abstention and has limited a state statute to uphold its validity, where the state court has not yet construed the provision. But neither has any precedent come to our attention requiring abstention under these circumstances. The cases hold that a federal court may not rule *invalid* a state statute which the state courts have not yet interpreted, where it is possible that the state court will so construe the provision as to obviate constitutional objections. See *e.g., Harrison* v. *Nat'l Ass'n for the Advancement of Colored People*, 360 U.S. 167 (1959). Consequently, while we should abstain from holding section 28-1(a)(10) invalid to await state judicial construction, we do not regard it as appropriate to abstain from holding it *valid* to await a construction which would, in all likelihood, be the same as ours.

(b) The government urged, in oral argument, that we avoid determination of plaintiff's contention that the Illinois provision is unconstitutional on a different ground. The government asserts that ths Court need not consider that argument if we rule that plaintiff's telephone service may be discontinued under subsection (d) because the information transmitted by plaintiff has been used by professional bookmakers in their operations, in violation of subsection (a).

Judge Will has already determined that plaintiff has not violated subsection (a), because plaintiff is not "engaged in the business of betting or wagering." *Telephone News System, Inc.* v. *Illinois Bell Tel. Co.*, 210 F. Supp. 471, 477 (N.D. Ill. 1962). The government asserts, however, that since the evidence established that one Retelle, a professional gambler and bookmaker in Lansing, Michigan, used plaintiff's telephone service, a violation of subsection (a) by Retelle has been established, and that plaintiff's telephone facilities should therefore be discontinued under subsection (d) because they have been used by Retelle to receive gambling information in violation of federal law.

In support of this position, the government urges that the term "transmission" as used in subsection (a) does not mean "sending," but rather means sending or receiving. Therefore, it maintains, Retelle violated subsection (a) when he received information from plaintiff over the telephone.

We must reject the theory that "transmission" as used in subsection (a) means sending or receiving. Whatever validity there might be to the argument that "transmission," in some contexts, has a meaning broader than the term "sending," it is plain that Congress meant it as "sending" in this statute. Subsection (d) uses the term "transmitting or receiving," and it is illogical to suppose that Congress would not have used both terms in both subsections had it meant to include "receiving" in subsection (a). We shall not assume that "transmission" has one meaning in subsection (a) and another in subsection (d), nor that "receiving" in subsection (d) is superfluous.

2. *Contention that § 28-1(a)(10) Is an Unreasonable Exercise of the Police Power*

Plaintiff contends that section 28-1(a)(10) of the Illinois Criminal Code is an unreasonable exercise of the police power of the state, because it is not reasonable designed to remedy the evils toward which the statute is directed, that is, the suppression of gambling. Plaintiff first asserts that this section, by its terms, forbids the transmission of the prohibited information before, during, and after a sporting event or contest, and that the prohibition of such transmission, no matter how long after the event, is patently unreasonable. Plaintiff further asserts that if it has violated this section, United Press International News Service, plaintiff's sole source of the information which is disseminates, likewise has violated this provision. Since there is no exemption in the Illinois statute for such a news service, plaintiff argues, the statute violates the first amendment to the United States Constitution.

In advancing its first argument, plaintiff relies upon *Parkes* v. *Bartlett*, 236 Mich. 460, 210 N.W. 492 (1926). In that case, the Michigan Supreme Court held that a state statute making unlawful the transmission of information concerning wagers was unconstitutional insofar as it related to the transmission of information after the event. The court held that the statute prohibited all publications of betting odds after the event, no matter how long thereafter, and that consequently the provision was not reasonable related to the suppression of gambling, but prohibited the harmful and the harmless alike.

Parkes v. *Bartlett* is distinguishable from the case at bar. In *Kelly* v. *Illinois Bell Tel. Co.*, *supra* at 464-65, section 28-1(a)(10) was reasonably interpreted to apply only to the rapid transmission of the proscribed information. See also *Telephone News System, Inc.* v. *Illinois Bell Tel. Co.*, *supra* at 475-77. The court based its interpretation upon the following statement of the Joint Committee which drafted the revised Illinois Criminal Code:

> "Subsection (a)(10) makes it an offense to knowingly transmit betting information over the telephone or other means of rapid communication. This is designed to reach middlemen, agents and other participants in the gambling racket who might not technically qualify as offenders under other subsections of the article. It also reaches into the heart of syndicate activity by outlawing the operation of telephone networks necessary to furnish betting information." Tentative Final Draft of the Proposed Illinois Criminal Code of 1961, Committee Comments at 307-08.

That the statute singles out "means of rapid communication" plainly indicates that it was the rapid transmission of information, shortly after the event, that was the object of the legislation. The prohibition of transmission of information as to wagers, betting odds, or changes in betting odds soon after the event is clearly related to the suppression of illegal gambling, for "modern bookmaking depends in large measure on the rapid transmis-

sion of gambling information. . . ." H.R. Rep. No. 967, 87th Cong., 1st Sess. (1961). See also *State* v. *Ucciferi*, 61 So. 2d 374 (Fla. 1952). This court has found that plaintiff's transmissions are fast or rapid within the prohibition of this section. *Telephone News System, Inc.* v. *Illinois Bell Tel. Co., supra* at 476. Consequently, plaintiff is in no position to complain of any hypothetical violation of the statute by the transmission of information long after an event. *Cf., United States* v. *Raines*, 362 U.S. 17 (1960).

In advancing its second argument, plaintiff asserts that unless such a news service as UPI is exempt from the operation of the Illinois statute, the provision violates the first amendment, citing *Kelly* v. *Illinois Bell Tel. Co., supra* at 465. In the *Kelly* opinion, Judge Will held that transmissions by telephone or telegraph to publishers of newspapers and other printed publications did not violate the provision. The Court held that the statute "is obviously directed at the rapid transmission of either actual wagers, betting odds or changes in betting odds *to or by persons directly or indirectly engaged in gambling operations.*" 210 F. Supp. at 465. (Emphasis supplied.) The court logically reasoned that since the section in question is a definition of "gambling" the legislature meant to limit the provision "to persons having some direct or indirect relation to gambling activities." *Ibid.* The court further reasoned that this limitation was required in order to avoid a conflict with the first amendment of the federal constitution. In the case at bar, this Court has found that the telephone information service furnished by plaintiff was used by a professional bookmaker, and that indeed "there is no evidence in the record . . . to indicate *any* legal use of plaintiff's information service." 210 F. Supp. at 476. It is thus clear that plaintiff transmits the information prohibited by this section to "persons directly or indirectly engaged in gambling operations."

Inasmuch as the application of this provision to the plaintiff is constitutional, having a reasonable relation to the suppression of gambling, we need not decide whether

the provision was meant to apply to the furnishing of a sports printer by the UPI to plaintiff. Again, we need not determine the scope and constitutionality of the application of this provision to every conceivable situation that might arise. *United States* v. *Raines, supra.*

Section 28-1(a)(10), as interpreted in *Kelly*, is limited to the rapid transmission of information by or to persons related to gambling activities. It is therefore a reasonable exercise of the police power, reasonably related to the suppression of gambling. *Cf. State* v. *Ucciferri*, 61 So. 2d 374 (Fla. 1952).

Accordingly, we conclude that neither section 1084(d) of title 18, U.S.C., nor section 28-1(a)(10) of the Illinois Criminal Code as applied in the case at bar, violates the provisions of the United States Constitution. A judgment order dismissing the plaintiff's complaint with costs to be assessed against the plaintiff will be entered in keeping with the views expressed in this memorandum of decision which together with the memorandum of decision reported at 210 F.Supp. 471, shall stand as the Court's findings of fact and conclusions of law within the meaning of Rule 52 of the Federal Rules of Civil Procedure.

WILL, District Judge (concurring).

This is, for me, an exceedingly troublesome case. The conclusions of Judge HOFFMAN'S scholarly opinion are inescapable in the light of the prior decisions discussed therein. Moreover, as I found in my earlier opinion—*Telephone News System, Inc.* v. *Illinois Bell Telephone Co.*, 210 W.Supp. 471, 476 (N.D.Ill. 1962)—there is nothing in the record of this case indicating any lawful use of plaintiff's facilities. I am satisfied that plaintiff's facilities are, in fact, used almost entirely by people engaged in illegal offtrack gambling on horse races and that their elimination will serve a useful public purpose. Notwithstanding, I am disturbed.

What concerns me is that, while any action under Title 18 U.S.C. § 1084(d) is necessarily predicated on a violation of federal, state or local criminal law by the utility user, the proceedings permitted under the statute, because allegedly civil in nature, are far short of what would constitute due process and the sanctions, on the other hand, far more serious than were criminal action taken directly under the same federal, state or local laws against the same utility user.

The instant case illustrates clearly the circumvention of traditional constitutional guarantees by the civil versus criminal semantics which the earlier decisions have developed and which Judge HOFFMAN has quite accurately applied in his opinion.

Here, an Assistant Attorney General of the United States wrote a short letter, dated April 25, 1962, to Illinois Bell Telephone Co. advising it that the Department of Justice had reason to believe that plaintiff's telephone facilities "are being and will be used for the transmission and receiving of gambling information in interstate commerce in violation of Federal law * * *." The letter notified the telephone company that it was required under Section 1084(d) to discontinue leasing telephone facilities to plaintiff and suggested that five days notice be given of the impending termination.

Thereafter, on April 27, 1962, the telephone company wrote an even more cryptic letter to the plaintiff as follows:

"Telephone News System, Incorporated
"81 West Van Buren Street
"Chicago, Illinois

"Gentlemen:

"We have received a letter from the United States Department of Justice, acting under Title 18 of the U. S. Code, Section 1084(d), requiring us to discontinue service on the telephone facilities furnished to you at 81 West Van Buren Street, Chicago, Illinois, after reasonable notice to you.

"It is our present intention to comply with this letter at 9 A.M., C.D.T., on May 5, 1962."

Plaintiff was then faced with the alternatives of doing nothing and thus being put out of business or seeking an injunction. It, of course, chose the latter and this action was commenced.

It will be noted that the foregoing two letters were in lieu of the investigation, presentment to a grand jury of evidence of a law violation, and the return of an indictment alleging specific acts violative of a clearly identified statute or statutes which would be required to institute a criminal case. Yet the charge is, as the Assistant Attorney General's letter to the telephone company indicates, that plaintiff is violating federal law, a charge incidentally which was not disclosed to plaintiff until after it commenced this suit.

So much for the pre-court phase of the matter. The second stage is equally sui generis. While the asserted law violator is nominally the plaintiff, the earlier cases hold, and I so held in my prior opinion, that the burden of proof is on the defendant. While the telephone company is nominally the defendant, the real party in interest, as it contended in its petition for leave to intervene, is the United States and so it, the intervenor, had the burden of proving that plaintiff's telephone facilities were being used in violation of federal, state or local law and it did present the only evidence in the case. That evidence,

incidentally, consisted primarily of the deposition of a professional gambler who admitted calling plaintiff's telephone number in connection with his activities. The deposition was taken after the commencement of plaintiff's action so the record gives no indication upon what evidence, if any, the government's original letter to the telephone company was based.

The standard of proof, however, since this is nominally a civil action, a suit for an injunction, has been held in the earlier cases to be merely "a preponderance of the evidence" rather than "beyond a reasonable doubt." There is, of course, no presumption of innocence, no right to a jury trial, no right of confrontation or any of the other criminal trial safeguards.

At the trial in the instant case, the government urged that the plaintiff had violated one or all of several federal and Illinois statutes. I found a finding in which my brothers concur, that it had established by a preponderance of the evidence only that plaintiff had violated one of the statutes in question, Section 28-1(a) (10) of the Illinois Criminal Code of 1961. It may be noted, in this connection, the the Department of Justice in its letter to the telephone company referred only to violations of federal law, and therefore the charge in the original letter from the Department of Justice to the telephone company stands unproved. I assume this to be immaterial, however, since Section 1084(d) makes violation of federal, state or local law a basis for termination of the utility service, and since, in any event, no indication of any grounds for termination were given, or apparently were required to be given, to plaintiff.

Probably the greatest incongruity in the civil versus criminal character of this case is the ultimate judgment. If the plaintiff had been convicted in an Illinois court of violating Section 28-1(a) (10) of the Illinois Criminal Code of 1961, the maximum penalty which could have been imposed, since it is a corporation, would have been a fine of $500 for the first offense and $1,000 for each subsequent offense. However, under 1084(d) and the civil-injunction proceedings which plaintiff was forced to

institute, the ultimate judgment can be the death penalty for it is agreed by all concerned that termination of plaintiff's telephone facilities means, as it would to most businesses, its demise. Yet, as Judge HOFFMAN'S opinion points out, the earlier decisions on the subject of forfeitures sanction such a result.

To summarize, Title 18 United States Code § 1084(d), as applied in the instant case, results in a federal court authorizing plaintiff's demise at the conclusion of a civil action, which judgment is based on a finding that the intervenor-defendant, the United States, has proved by a preponderance of the evidence that the plaintiff violated a criminal statute of the State of Illinois.

This to me incongruous procedure and result is the logical extension of a line of decisions which seems to me to warrant re-examination. These are the decisions holding that a forfeiture is not a penalty and, accordingly, that proceedings involving forfeitures are civil, not criminal, in nature. The earliest important decision on this question is *Dobbins' Distillery* v. *United States*, 96 U.S. 395, 24 L.Ed. 637 (1877), in which the distillery was seized and forfeited on the grounds that the lessee "made false entries in the books kept in the distillery, and * * * he omitted to enter in the same the facts required by law, with intent to defraud * * *." Id. 96 U.S. at 396, 24 L.Ed. 637. The defendant, which was the owner of the property and not the lessee thereof, urged that it had no knowledge of the acts charged and that a criminal, not a civil, trial should have been required. In upholding the forfeiture, the Court said:

> "Cases arise, undoubtedly, where the judgment of forfeiture necessarily carries with it, and as part of the sentence, a conviction and judgment against the person for the crime committed; and in that state of the pleadings it is clear that the proceeding is one of a criminal character: but where the information, as in this case, does not involve the personal conviction of the wrong-doer for the offence charged, the remedy of forfeiture claimed is plainly one of a civil nature; as the conviction of the wrong-doer must be obtained,

if at all, in another and wholly independent proceeding * * *.

"Forfeitures, in many cases of felony, did not attach at common law where the proceeding was *in rem* until the offender was convicted, as the crown, Judge Story says, had no right to the goods and chattels of the felon, without producing the record of his conviction; but that rule, as the same learned magistrate says, was never applied to seizures and forfeitures created by statute *in rem*, cognizable on the revenue side of the exchequer court, for the reason that the thing in such a case is primarily considered as the offender, or rather that the offence is attached primarily to the thing, whether the offence be *malum prohibitum* or *malum in se* * * *." Id. 96 U.S. at 399-400, 24 L.Ed. 637.

Subsequent decisions, including *United States* v. *Zucker*, 161 U.S. 475, 16 S.Ct. 641, 40 L.Ed. 777 (1896); *Various Items of Personal Property* v. *United States*, 282 U.S. 577, 51 S.Ct. 282, 75 L.Ed. 558 (1931); and *Helvering* v. *Mitchell*, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917 (1938), broadened the type of property which might be seized and forfeited without constituting a penalty or punishment and which seizures therefore were beyond the requirements and protection of due process.

Interestingly, a related line of cases has developed simultaneously holding that, if the person whose alleged violation of some criminal law is the basis for the forfeiture has previously been tried and acquitted, no civil seizure of the property may be made. *Coffey* v. *United States*, 116 U.S. 436, 6 S.Ct. 437, 29 L.Ed. 684 (1886) and *Inman* v. *United States*, 151 F.Supp. 784 (W.D.S.C. 1957). As the decisions now stand, a forfeiture prior to criminal prosecution and establishment of guilt constitutes due process, but after prosecution and acquittal it does not.

The case apparently has not yet arisen in which the acquittal in the criminal proceedings follows the forfeiture. It undoubtedly will and, unless the basic concept changes, some court will be faced with the necessity of reconciling the irreconcilable.

The distinction between civil or criminal proceedings for the violation of a criminal law based as it now is on the distinction between punishment and penalty or so-called preventive regulation seems to me to be particularly incongruous where, as here, the maximum penalty, a fine of $500, which might have been imposed in a criminal proceeding with all the constitutional safeguards respected, is infinitely less than the sanction of being put out of business or having property forfeited, these being the result of the civil action devoid of constitutional safeguards. Yet the basis for both proceedings is precisely the same, the violation of the state criminal law.

In this connection, it should be noted that the recent Supreme Court decision of *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed. 2d 644 (1963), discussed in Judge HOFFMAN's opinion, held invalid as punitive a section of the Immigration and Nationality Act of 1952 which automatically divested an American of his citizenship without the necessity of any prior criminal trial if he left or stayed outside the country to avoid the draft. The Court concluded that forfeiture of citizenship was clearly punishment. It seems to me that where the forfeiture of property will be fatal to the business life of the party involved and substantially greater and more severe than the maximum punishment which could have been imposed in a direct criminal proceeding, labelling it preventive and non-penal is a sophistry which hardly warrants the abrogation of the Constitutional protections which are the keystones of American criminal justice.

While not, of course, determinative, it should be noted that Congress saw fit to title sec. 1084, of which the subsection before us is a part, with the designation "Penalties".

Although we are here called upon to pass only on the application of sec. 1084(d) to the facts of the instant case, it is appropriate, at least in passing, to reflect upon the implications and possible application of the procedure to other situations, for it represents, I believe, a new technique in criminal law enforcement. If the withdrawal of

a vital utility service may be accomplished constitutionally by the simple mechanics contemplated by sec. 1084(d) where the facility is allegedly being used to violate federal, state or local criminal laws relating to gambling, it presumably will be equally valid for eliminating alleged violations of other federal, state and local criminal laws, such as federal and state anti-trust laws, those regulating the sale and distribution of securities, the possession and sale of narcotics, income, sales and other tax laws and so on.

In our inter-dependent economy, where rapid communication is vital to virtually every commercial enterprise, the withdrawal of telephone facilities on the ground that some federal, state or local law enforcement officer has reason to believe that they are being used in violation of a federal, state or local law, may prevent some law violations. But it will also eliminate all of the basic safeguards which we have so carefully developed to protect the accused even though he be ultimately found guilty.

And, of course, the technique need not be limited to telephone facilities, since the withdrawal of other utility services would presumably be equally proper.

Illegal gambling and the interstate rapid transmission of information which makes it possible are rightly matters of serious public concern as are violations of all criminal laws. Our law enforcement officials are entitled to all possible assistance consistent with those safeguards of due process which we deem indispensable to the protection of the individual citizen.

Substituting so-called preventive forfeitures of property for penal sanctions of fines or sentences of incarceration and thereby converting criminal into civil proceedings does not seem to me to be the proper answer to our law enforcement problems.

In the light of the decisions so carefully analyzed and applied in Judge Hoffman's opinion, I concur in the judgment of the Court.

APPENDIX C

Thomas F. KELLY, Sr., Thomas F. Kelly, Jr., and George L. Kelly, co-partners, doing business under the name and style of Illinois Sports News, Plaintiffs,

v.

ILLINOIS BELL TELEPHONE COMPANY, an Illinois corporation, The Western Union Telegraph Company, a New York corporation, Defendants,

and

United States of America,
Defendant-Intervenor.

Civ. A. Nos. 62 C 955, 62 C 932.
United States District Court
N. D. Illinois, E. D.

Oct. 23, 1962.

WILL, *District Judge*.

The Court, having examined the pleadings, the Stipulations of Facts, and the documents admitted as evidence in this case, and having heard the arguments of and examined the briefs filed by counsel, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Thomas F. Kelly, Sr., Thomas F. Kelly, Jr. and George L. Kelly are residents of the State of Illinois and are co-partners in and sole owners of the business known as "ILLINOIS SPORTS NEWS" (hereinafter referred to as "Illinois"). Their principal office is located at 906-08 South Wabash Avenue, Chicago, Illinois.

2. Illinois publishes the publication known as "Illinois Sports News", various editions of which are printed daily, except Sunday, in the English language, and circulated and displayed for sale to the public generally throughout the midwest and as far south as Florida and Louisiana. The publication is printed on a semi-stiff sheet of hard paper approximately 12½ by 19 inches in overall dimensions, and double folded so as to make eight pages each approximately 6¼ by 9½ inches.

3. The information contained in the different editions varies considerably. Some editions printed for use at a particular race track contain information only with respect to the races being run at that track on the date of publication (See Court exhibit No. 1). Other editions contain information with respect to races being run at various tracks throughout the country as well as short news items with respect to matters of interest in sports other than horse racing, such as golf, baseball, boxing, etc. (See Court exhibit No. 2.)

4. Illinois, which has a bona fide list of actual prepaid subscribers, has been published regularly since 1947 at the same address, under the same name and style.

5. Illinois has continuously utilized the facilities of the defendant Illinois Bell Telephone Company, an Illinois corporation (hereinafter referred to as "Telephone Company"), and The Western Union Telegraph Company, a New York corporation (hereinafter referred to as "Western Union") as well as the facilities of the UNITED PRESS INTERNATIONAL (hereinafter referred to as "United") since the following dates:

Telephone Company	1947
Western Union	1951
United	1947

In addition, Illinois has had and used second class mail privileges granted by the United States Post Office Department since 1947.

6. Certain of the employees of Illinois, including linotypers and drivers, are members of various unions and Illinois has contracts with such unions.

7. Since 1947 Illinois has used the facilities provided it by the Telephone Company in carrying out its everyday business and, in addition, receives by telephone each morning, except Sunday, certain information concerning horse racing, more particularly described as follows:

(a) "Scratches" means the names of horses which have been withdrawn from the horse racing events in which they had been entered to compete.

(b) "Jockeys and Weights" means the names of the jockeys who will ride specified horses in that day's racing events and the weights of said jockeys.

(c) "Track Condition", meaning whether or not the track is wet fast, muddy, or slow.

(d) "Program Selections", the selections by the track handicapper, which appear in the official printed program, constituting the track handicapper's estimate of the winner, place (second) and show (third) horses as they will finish in each particular racing event.

(e) "Post Position of Horses", meaning the relative position from the inside to the outside of the track in which the horses will start the race.

8. The foregoing information, after receipt, is studied by so-called handicappers employed by Illinois at its place of business, who prepare their own estimates of the respective abilities of each of the horses entered in the various racing events, and their own estimates of the possibilities of each horse winning in the event in which he is entered. The information received by telephone, as previously set forth, together with the handicappers' estimates or forecasts of what the wagering through the parimutuel machines at the track is likely to be, which is called the "morning line", as well as the handicappers' own selection or estimate of the order in which the horses will finish in each event, is published in certain of the

editions of the Illinois Sports News. In addition, certain information concerning the past performances of the various horses is published in the same editions.

9. With the exception of the "morning line" and "past performance" information, all of the foregoing is also transmitted by telephone each morning, except Sundays, to the Detroit Sports News of Detroit, Michigan; Harvey A. Junior of Miami, Florida, and The Toronto Daily Sports News of Toronto, Ontario, Canada. Each of these publications contains horse racing information and they have been published for 19, 32 and 28 years respectively.

10. In addition, the telephone facilities are also used to obtain information from race tracks in the Chicago, Illinois; Detroit, Michigan; New Orleans, Louisiana; and Hot Springs, Arkansas areas when such tracks are running. The information received from the tracks in question consists of the names of the horses entered and their anticipated jockeys for the following day's races.

11. For many years Illinois has used the facilities of Western Union each day, except Sunday, for the transmission of racing information and other information of a general character to Chicago's American of Chicago, Illinois formerly the Chicago Herald-American, the Chicago Turf Bulletin of Chicago, Illinois, The Pierce News Company of St. Louis, Missouri, and, prior to July 20, 1962, a business owned by plaintiffs as co-partners and known as the Louisville Daily Sports News (hereinafter referred to as "Louisville"). Each of the foregoing publishes publications containing horse racing information and information of a general character.

12. Illinois uses the facilities of United for the receipt of information of a public and sporting character. Some of such information is published by Illinois in its publications and some is transmitted by Western Union teleprinter facilities as hereinbefore set forth.

13. Neither Illinois nor Louisville have, since September 13, 1961, furnished any information, other than by

means of their publications, to any person or business except as set forth in paragraphs 9 and 11 hereof.

14. Neither plaintiffs nor their employees accept bets or wagers either by telephone or telegraph or otherwise.

15. The various editions of Illinois' publications may generally be described as follows:

(a) *Harness Track Edition*—sold in Chicago at newsstands and at the harness track when harness racing events are being held in the Chicago area containing entries, morning line, post position, handicap order, jockeys, weights and past performances. This publication is published and available for purchase at approximately 3 P.M. on racing days.

(b) *Early "Overnight" Edition*—sold in Chicago at newsstands, in the local tracks and out of town and in other states to news distributors, containing entries, overnight line, handicap order, jockeys, weights, past performances, post position, and information of a general nature, and is published and available for purchase after 3:30 P.M. daily, except Sundays.

(c) *Late "Overnight" Edition*—sold out of town, and in other states, to newsdealers and newsstands, except on Saturday night, when part of this edition is sold in Chicago, containing entries, overnight line, handicap order, jockeys weights, past performances, post position, results and information of a general nature, and is published and available for purchase after 6 P.M. daily, except Sundays.

(d) *Latest Turf Edition*—sold in Chicago at newsstands and within 40 miles thereof and to news distributors in nearby states, containing entries, jockeys, post position, weights, morning line, scratches, past performances, results and information of a general nature, and is published and available for purchase after 9 P.M. daily, except Sundays.

(e) *Race Track Edition*—sold at newsstands in the Chicago area and in the local tracks and containing entries, jockeys, weights, morning line, post position,

scratches, past performances and results of horses entered in events at the local tracks and is published and available for purchase after 10 A.M. daily, except Sundays.

(f) *Weekly Edition*—published once weekly, giving "selections" of outstanding horses entered at various race tracks which might participate in racing events scheduled for the succeeding week.

16. The last edition published by Illinois for a particular day's racing events is printed, published and distributed before 10:30 A.M. of that day and the first edition for the following day's racing events is printed, published and distributed after 3:30 P.M. Prior to July 20, 1962, Louisville printed, published and distributed only one edition daily, except Sundays, which was distributed before 10:00 A.M. The Louisville office then closed until the following morning at about 6 A.M. Since July 20, 1962, Louisville has suspended publication.

17. Illinois has a total daily net paid circulation which varies from a low of approximately 6,725 copies per day in December to a high of approximately 29,000 copies per day in August when horse racing meetings are being held in Chicago, Illinois. The daily average net circulation is approximately 17,000 copies per day. During the low month of December, the total of 6,725 copies sold daily is made up of approximately 4,300 Latest Turf Editions, 2,360 Overnight Editions, and 125 Weekly Editions, all as hereinbefore described. During the month of August the total of approximately 29,000 copies sold daily is made up of approximately 2,850 Harness Track Editions, 2740 Early Overnight Editions, 1,500 Late Overnight Editions, 17,260 Latest Turf Editions, 4,618 Race Track Editions and 125 Weekly Editions. Louisville had a total daily net paid circulation which varied from a low of approximately 1,000 copies per day during December to a high of approximately 2,500 copies per day during May when Churchill Downs conducts a horse race meeting in the vicinity of Louisville, Kentucky, the average daily sales and distribution being approximately 1,729 copies.

18. Illinois advertises in all editions of its publications of the Illinois Sports News, except its race track and harness editions, without charge, that racing information can be obtained by calling Chicago telephone number Webster 9-1900, a facility leased by Telephone News System, Inc. from the Telephone Company, and Illinois pays Telephone News System, Inc., $600.00 weekly for advertising Illinois by spot announcements on the telephone service maintained by Telephone News System, Inc.

19. Information pertaining to the same races as are carried in the publications of Illinois is reported in varying degrees in newspapers of general circulation in the City of Chicago including The Chicago American, The Chicago Tribune, The Chicago Sun-Times, and The Chicago Daily News. The "Racing Special" edition of Chicago's American carries substantially similar information with respect to races at various race tracks around the country as is carried in the "Latest Turf Edition" of the Illinois Sports News (see Court's exhibits 2 and 3).

20. The general regulations of the Illinois Bell Telephone Company applicable to general local exchange tariffs provide in part as follows:

> "USE OF SERVICE FOR UNLAWFUL PURPOSE —The service is furnished subject to the condition that it shall not be used for the purpose of making or accepting bets, furnishing information, or for any other purposes in connection with any gambling scheme, business or device, or for any similar unlawful purpose. Any subscriber whose service is to be discontinued or any applicant to whom service is to be denied under this regulation will be notified by the Telephone Company of his right to a hearing by the Illinois Commerce Commission to determine whether or not such service is being used or will be used in violation of this rule. Upon complaint to the Commission by any applicant or subscriber who is affected by the refusal or discontinuance of service in accordance with this rule, such service will be provided, con-

tinued or restored if the Commission shall determine that the service has not been used or is not intended to be used in violation of this rule."

21. The general regulations of the American Telephone and Telegraph Company applicable to message toll telephone service provide, in part, as follows:

"USE OF SERVICE FOR UNLAWFUL PURPOSES —The service is furnished subject to the condition that it will not be used for an unlawful purpose."

22. The facilities of the Telephone Company and Western Union are indispensable to the operations of the plaintiffs' business, which grosses in excess of $10,000 per week, and the discontinuance of the services of the Telephone Company and Western Union to Illinois would force plaintiffs out of business.

23. Under date of April 25, 1962, the United States Department of Justice, over the signature of Herbert J. Miller, Jr., Assistant Attorney General, wrote to the Telephone Company as follows:

"Mr. Floyd Brown
"Security Department
"Illinois Bell Telephone Company
"212 West Washington Street
"Chicago 6, Illinois

"Dear Mr. Brown:

"Information in the files of the Department of Justice reveals that the telephone facilities located at the following place are being and will be used for the transmission and receiving of gambling information in interstate commerce in violation of Federal law:

"Illinois Sports News
"906-08 South Wabash Avenue
"Chicago 5, Illinois
"(WEbster 9-5900)

"Pursuant to the provisions of subsection (d) of Section 1084 of Title 18, United States Code, you are

therefore required to discontinue the leasing of said facilities after reasonable notice to the subscriber.

"In my judgment five days notice constitutes reasonable notice under the circumstances."

24. Under date of April 27, 1962, the Telephone Company, over the signature of F. H. Brown, Chief Special Agent, wrote to Illinois as follows:

"Illinois Sports News
"906-08 South Wabash Avenue
"Chicago 5, Illinois

"Gentlemen:

"We have received letters from the United States Department of Justice, acting under Title 18 of the U. S. Code, Section 10084(d), requiring us to discontinue service on the telephone and teletype facilities furnished to you at 906-08 South Wabash Avenue, Chicago, Illinois, after reasonable notice to you.

"It is our present intention to comply with this letter at 9 A.M., C.D.T. on May 5, 1962."

25. Under date of April 25, 1962, the United States Department of Justice, over the signature of Herbert J. Miller, Jr., Assistant Attorney General, wrote Western Union as follows:

"Mr. C. T. Baumgart
"District Manager
"Western Union Company
"427 South La Salle Street
"Chicago 5, Illinois

"Dear Mr. Baumgart:

"Information in the files of the Department of Justice reveals that the Western Union Sports Ticker, located at the following place is being and will be used for the transmission and receiving of gambling information in interstate commerce in violation of Federal law:

"Illinois Sports News
"906-08 South Wabash Avenue
"Chicago 5, Illinois

"Pursuant to the provisions of subsection (d) of Section 1084 of Title 18, United States Code, you are therefore required to discontinue the leasing of said facilities, after reasonable notice to the subscribers.

"In my judgment five days notice constitutes reasonable notice under the circumstances."

26. Under date of April 30, 1962, the Department of Justice, over the signature of Herbert J. Miller, Jr., Assistant Attorney General, wrote Western Union as follows:

"Mr. C. T. Baumgart
"District Manager
"Western Union Company
"427 South La Salle Street
"Chicago 5, Illinois

"Dear Mr. Baumgart:

"Reference is made to our letter to you of April 25, 1962 with reference to the Western Union Service provided to the Illinois Sports News. As we indicated, the equipment leased by you is being used for the transmission of gambling information in interstate commerce in violation of Federal law and, under the provisions of Section 1084(d), Title 18, United States Code, you are required to remove the service. It has been called to our attention, however, that in the above-mentioned letter, we referred to the equipment in question as a Western Union Sports Ticker, and that no such equipment is in service at Illinois Sports News. Actually, the equipment is a Western Union teletype, over which Illinois Sports News transmits gambling information originating in its offices. It is to that equipment that we intend to apply the provisions of Section 1084(d).

"As we indicated in our original letter we feel that five days' notice to the subscriber constitutes reasonable notice in this matter."

"27. Under date of May 2, 1962, Western Union, over the signature of C. T. Baumgart, District Manager, wrote to Illinois as follows:

"Illinois Sports News
"906 South Wabash Avenue
"Chicago, Illinois

"Gentlemen:

"This refers to the leased wire service which is provided by The Western Union Telegraph Co. to your company with the following connections:

"Illinois Sports News, 906 S. Wabash Avenue Chicago, Illinois

"Bulletin-Record Publishing Co., 608 S. Dearborn Chicago, Illinois

"Chicago Herald American, Sports Department, Editorial Room, 5th Floor, Tribune Building, Chicago, Illinois

"Concensus Printing Co., 7405 Page Street, St. Louis, Missouri

"Louisville Daily Sports News, 325 Breckenridge Avenue, Louisville, Kentucky

"I have today received a letter from the United States Department of Justic which indicates that the equipment leased to you by Western Union is being used for the transmission of gambling information in interstate commerce in violation of Federal law and, under the provisions of Section 1084(d), Title 18, United States Code, we are required to remove the service as detailed above.

"Please accept this as notice, therefore, that the service we are providing will be discontinued at 7 P.M. on Tuesday, May 8, 1962.

"Our equipment will be removed thereafter as soon as practicable."

Conclusions of Law

1. Plaintiffs' activities do not violate the provisions of Illinois Revised Statutes, Chapter 38, Section 28-1(a)(10).

2. Plaintiffs' activities do not violate the provisions of Section 1084(a), Title 18 U.S.C.

3. Plaintiffs' activities are within the exception to the prohibitions of Section 1084(a), Title 18 U.S.C., contained in Section 1084(b), Title 18 U.S.C.

4. Plaintiffs' conviction in the United States District Court for the Western District of Kentucky for violation of Section 1953, Title 18 U.S.C. does not establish that the plaintiff's use of telephone and telegraph facilities is within the ambit of Section 1084(d), Title 18 U.S.C.

5. Plaintiffs are entitled to a permanent injunction restraining defendants Illinois Bell Telephone Company and The Western Union Telegraph Company from terminating their services to plaintiffs.

Opinion

Plaintiffs seek an injunction permanently restraining defendants Telephone Company and Western Union from discontinuing, disconnecting or otherwise terminating the telephone and telegraph facilities heretofore furnished by such defendants to plaintiffs. Upon petition of the plaintiffs and with consent of the defendants and the defendant-intervenor, United States of America, the Court has heretofore entered a temporary restraining order pending determination of the plaintiffs' prayer for a permanent injunction.

In support of their request for a permanent injunction, plaintiffs make two principal contentions:

1. That their activities do not violate any Federal, State or local law and that therefore the provisions of Title 18 U.S.C. § 1084(d) are inapplicable to them; or

2. That, if it be determined that the provisions of such section are applicable to them, the section in question is invalid in that it is contrary to the First and Fifth Amendments to the Constitution of the United States.

The government, as defendant-intervenor, on the other hand, contends:

1. That the activities of the plaintiffs do violate certain Federal and State laws, to wit—

(a) Chapt. 38, Illinois Revised Statutes, Section 28-1(a) (10);
(b) Title 18 U.S.C. § 1084(a);
(c) Title 18 U.S.C. § 1952;
(d) Title 18 U.S.C. § 1953; and
(e) Title 47 U.S.C. § 501.

2. That the provisions of Section 1084(d) in their application to the plaintiffs are valid and not in violation of either the First or Fifth Amendments to the Constitution of the United States.

Defendants Telephone Company and Western Union take no position with respect to whether on not the activities of plaintiffs violate any Federal, State or local law but assert simply that if it be found that they do, the procedures established by Section 1084(d) of Title 18 do not violate constitutional due process. That section, under which the Department of Justice demanded of the defendants Telephone Company and Western Union that they terminate the services being rendered to plaintiffs and pursuant to which such defendants notified plaintiffs of their intentions to discontinue such services, reads as follows:

> "(d) When any common carrier subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty, or forfeiture, civil or criminal, shall be found against any

common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored."

It is apparent from the foregoing that the penalty of discontinuance of facilities provided by the section is applicable only if it be found that the facility is being used "for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law". While the instant action is a civil proceeding in that plaintiffs seek an injunction, it is perfectly apparent that Section 1084(d) imposes penalties for the violation of law and is in this respect quasi-criminal in nature. Moreover, although the plaintiffs here seek an injunction, the real moving party in this proceeding is the United States government which, by virtue of the letters of the Department of Justice, stimulated this action.

[1] Under these circumstances, the burden of proof rests with the defendants and the defendant-intervenor, *Fay* v. *Miller*, D.C.Cir.1950, 87 U.S.App.D.C. 168, 183 F.2d 986; *Andrews* v. *Chesapeake & Potomac Telephone Co.*, D.C.D.C. 1949, 83 F.Supp. 966; *Hocker* v. *O'Klock*, 16 Ill. 2d 414, 158 N.E.2d 7 (1959), although it is also clear from the cases just cited that the standard of proof is that of a civil action, namely a preponderance of the evidence.

The first question then is whether the record before this Court establishes by a preponderance of the evidence that the plaintiffs are using telephone or telegraph facilities to transmit or receive gambling information in interstate or foreign commerce in violation of some Federal, State or local law so that the sanctions of Section 1084(d) of Title 18 may properly be applied to them.

It is necessary, therefore, to examine the various Federal and State statutes which the government contends are being or have been violated by plaintiffs.

The first such statute is Section 28-1 (a) (10) of the Illinois Criminal Code of 1961. This provision, which became effective January 1, 1962, provides that a person commits illegal gambling when he—

> "Knowingly transmits information as to wagers, betting odds, or changes in betting odds by telephone, telegraph, radio, semaphore or similar means; or knowingly installs or maintains equipment for the transmission or receipt of such information."

It is the government's contention that the transmission by telephone or telegraph to publishers of newspapers or other publications, such as those published by plaintiffs, of the various types of information with respect to horse races set forth in the Findings of Fact, constitutes a violation of the section in question. The plaintiffs contend that a proper interpretation of the statute would limit its application to transmission of information to bookmakers outside of race track enclosures with respect to activity taking place within such enclosures.

While documentation as to the intentions of the Illinois legislature in enacting the section in question is sparse, the following statement of the Joint Committee, which drafted the revised Illinois Criminal Code, is helpful:

> "Subsection (a) (10) makes it an offense to knowingly transmit betting information over the telephone or other means of rapid communication. This is designed to reach middlemen, agents and other participants in the gambling racket who might not technically qualify as offenders under other subsections of the article. It also reaches into the heart of syndicate activity by outlawing the operation of telephone networks necessary to furnish betting information." Tentative Final Draft of the Proposed Illinois Criminal Code of 1961, Committee Comments pp. 307-308.

It is to be noted that the explanation lays stress on "means of rapid communication". Similarly, the statute refers to "telephone, telegraph, radio, semaphore or similar means" again indicating that it was the intention of the legislature to make it illegal to engage in the rapid transmission of information as to wagers, betting odds or changes in betting odds.

While plaintiffs utilize such means of rapid communication in the transmission of information, it is perfectly clear that they do not furnish such information by telephone or telegraph to persons who utilize it in the making or receiving of bets but simply furnish it to publishers of printed publications who incorporate it in their publications.

[2] In the Court's opinion, the government is correct in contending that the statute is not limited to the transmission of information from within racing enclosures to the outside, but is incorrect in asserting that it applies to any utilization of telephone, telegraph or other facilities for the transmission of such information without regard to the identity of the persons transmitting or receiving such information.

The section in question is a definition of "gambling". Any reasonable construction, therefore, requires the conclusion that it is limited to the transmission by telephone, telegraph, etc. of such information to persons having some direct or indirect relation to gambling activities. In this connection, it should be noted that nowhere in the record before the Court is there any evidence that either the transmission of information by plaintiffs or their publications are directly or indirectly related to gambling activities.

If the government's interpretation is to be accepted, every transmission or the maintenance of any equipment for the transmission or receipt of information as to wagers, betting odds or changes in betting odds on any sporting event, election, etc. such as the Associated Press, United Press International, as well as by newspapers of general

circulation, would be in violation of the section in question since there is no provision exculpating them from its application. That the Illinois legislature intended such a substantial expansion of the concept of "gambling" is certainly not apparent from the language of the section or its legislative history.

[3] Moreover, such an interpretation would require a determination that the statute in question is unconstitutional as in violation of the First Amendment to the Constitution of the United States. It is well established that a statute should be construed, if possible, so as to render it valid and constitutional rather than invalid and unconstitutional. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30, 57 S.Ct. 615, 81 L.Ed. 893 (1936); *United States* v. *Five Gambling Devices*, 346 U.S. 441, 74 S.Ct. 190, 98 L.Ed. 179 (1953).

Section 28-1(a) (10) is obviously directed at the rapid transmission of either actual wagers, betting odds or changes in betting odds to or by persons directly or indirectly engaged in gambling operations. Neither the language of the statute nor the available legislative history indicates any intention to include transmissions of information to and for subsequent use by publishers of newspapers and other printed publications. Accordingly, plaintiffs' activities do not constitute "gambling" under Section 28-1 (a) (10) of the Illinois Criminal Code.

[4] The first Federal statute alleged to be violated by plaintiffs is Section 1084 (a) of Title 18 United States Code, which reads as follows:

> "(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers,

or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both."

It is the government's contention (page 7 of its Supplemental Memorandum) that the "dissemination of racing information by Illinois Sports News * * * constitutes an illegal transmission of 'information assisting in the placing of bets or wagers on any sporting event or contest' within the meaning of Section 1084 (a) and therefore justifies the removal of such service under Section 1084(d)."

The plaintiffs deny the applicability of the section in question, asserting that by its terms it is limited to persons "being engaged in the business of betting or wagering" and that they do not fall within that category. In answer to this contention, the government points out that the legislative history of the section indicates clearly that Congress declined to use the more restricted phrase "business of accepting wagers" which is contained in the so-called Wagering Tax Act, 26 U.S.C. 4401(c), and it must therefore be concluded that it was the Congressional intent to include within the provisions of Section 1084(a) persons other than "bookies" who actually accept bets or wagers.

Examination of the language of the section as well as its legislative history indicates beyond any doubt that Congress did intend to reach the activities of persons other than those directly accepting bets or wagers. There is considerable testimony in the hearings with respect to the complex nature of interstate gambling on sporting events, particularly horse races, and the variety of activities involved over and above the mere receipt of bets from individuals.

Recognizing that it was the intention of Congress to reach the activities of persons "engaged in the business of betting or wagering" other than "bookies" who receive bets directly from individuals, it nevertheless seems clear that the section in question does not include plaintiffs.

It has been stipulated by the parties and a Finding of Fact has been made that none of the plaintiffs or their employees engage in the receipt of bets or wagers. Nor is there any evidence before the Court that those to whom plaintiffs transmit information by use of any wire facility are so engaged.

[5] It is well settled that words in a statute shall be given their normal and ordinary meaning. *Old Colony R. Co.* v. *Commissioner*, 284 U.S. 552, 560, 52 S. Ct. 211, 76 L.Ed. 484 (1932). *United States* v. *Stewart*, 311 U.S. 60, 63, 61 S.Ct. 102, 85 L.Ed. 40 (1940), rehearing denied, 311 U.S. 729, 61 S.Ct. 390, 85 L.Ed. 475 (1940). The government's contention that Section 1084(a) encompasses anybody who transmits "information assisting in the placing of bets or wagers on any sporting event or contests," is inconsistent with the language of the section itself. Had Congress intended such an interpretation, the limiting phrase "being engaged in the business of betting or wagering" would have been omitted and the statute would read simply, "Whoever • • • knowingly uses a wire communication facility for the transmission, etc."

Giving effect to all of the language actually used by Congress, it must be concluded that the prohibitions of Section 1084(a) are applicable only to persons who, in the normal context of the words, can be said to be "engaged in the business of betting or wagering". On the record before this Court, it is clear that plaintiffs are not so engaged.

In this connection, it is interesting to note that at least one committee of Congress has doubts as to whether even so-called wire services which do transmit instantaneous information for use by professional gamblers are subject to the provisions of Section 1084(a). In the Report of the Subcommittee on Investigations of the United States Senate Committee on Government Operations, issued March 28, 1962. (86th Congress) 2nd Session, Senate Report No. 1310), and Amendment to Section 1084(a) is recommended because (Page 46)—

"There is a distinct possibility that many of the wire services which were the subject of the subcommittee's investigation do not fall within the provision of this statute since they are not in fact 'engaged in the business of betting or wagering.' "

The report in question also makes it explicit that in referring to "wire services" the committee does not include legitimate news reporting agencies such as the Associated Press or United Press International. At Page 3 thereof the report states—

"The term 'wire service', in its usual sense, refers to legitimate agencies such as Associated Press and United Press International which gather news and disseminate it to daily newspapers and radio and television stations via teletype machines.

"In the context of the subcommittee's investigation the term took on an entirely different meaning. To gamblers and bookmakers 'wire service means a horserace wire service and refers to a confederation of operators who supply and service the Nation's bookmakers, usually on a telephonic network, with fast race results and other information on horseraces around the country as an accessory to bookmaking operations."

It is also clear that the transmission of information for use by publishers of newspapers and other periodic publications was not intended by Congress to be subject to the prohibitions of the section in question. In testimony presented to the House Committee in support of the bill, which subsequently became Section 1084, the Attorney General of the United States, Robert F. Kennedy, described the type of activity which it was intended to reach. In his testimony before the House Committee on the Judiciary on May 17, 1961 (hearings before subcommittee #5 Committee on the Judiciary, House of Representatives, 87th Congress, 1st Session, Serial #16, page 24), the Attorney General stated—

"Thus information almost simultaneously transmitted prior to, during and immediately after each race on such items as the starting horses, scratches of entries, probable winners, betting odds, results and the prices paid, is essential to the bookmaker and his clientele in order to insure any sizable gambling."

Subsequently, in response to a question, he stated (page 37)—

"As I said in my statement, the great problem for those involved in this business is instantaneous information. They cannot rely on the fact that this information is going to appear in time in the Washington Post. They are going to, and have to set up other facilities in order to obtain information.

"If we have the enactment of this law, this will seriously curtail their activities."

In the reports of the Senate and House Judiciary Committees accompanying the respective bills, the purpose of Section 1084(a) is also specified. The report of the Senate Judiciary Committee (Report to Accompany S. 1656, 87th Congress, 1st Session, Senate, Calendar No. 560, Report No. 588) states (page 2)—

"The second amendment changes the language of the bill, as introduced (which prohibited the leasing, furnishing, or maintaining of wire communication facility with intent that it be used for the transmission in interstate or foreign commerce of bets or wagers), to prohibit the use of wire communication facility by persons engaged in the business of betting or wagering, in the belief that the individual user, engaged in the business of betting or wagering, is the person at whom the proposed legislation should be directed; * *."

Similarly, the report of the House Committee on the Judiciary (Report to Accompany S. 1656, 87th Congress, 1st Session, House of Representatives, Report No. 967) states (page 2), U.S. Code Cong. and Adm. News 1961, p. 2631—

"Testimony before your Committee on the Judiciary revealed that modern bookmaking depends in large measure on the rapid transmission of gambling information by wire communications facilities. For example, at present the immediate receipt of information as to results of a horserace permits a bettor to place a wager on a successive race. Likewise, bookmakers are dependent upon telephone service for the placing of bets and for layoff betting on all sporting events. The availability of wire communication facilities affords opportunity for the making of bets or wagers and the exchange of related information almost to the very minute that a particular sporting event begins."

In the light of all the foregoing, it is the Court's opinion that the activities of plaintiffs were not intended by the Congress to be and are not within the scope of Section 1084(a), Title 18 U.S.C.

[6] Plaintiffs further contend that even if it should be determined that their transmission of information is within the scope of Section 1084(a), they are excluded therefrom by the provisions of Section 1084(b), which provides:

"Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contents * * *."

In support of this contention, plaintiffs urge that their publications are legitimate periodicals published and sold openly and that Congress intended to exclude them together with the legitimate news reporting wire services and newspapers.

The question of what constitutes "information for use in news reporting of sporting events or contests" depends again on the normal and ordinary usage of the terms in question. The record is clear that information similar or in some instances virtually identical to that carried in plaintiffs' publications is regularly reported in newspapers of general circulation. It is a matter of com-

mon knowledge that information concerning future sporting events as well as the results of concluded events is normally reported by newspapers of general circulation.

Inasmuch as the government concedes that Section 1084(d) excludes newspapers generally, it is incongruous to contend that Congress intended to prohibit the transmission of identical information for publication in periodicals such as those published by plaintiffs, but to permit it for publication in newspapers of much broader circulation and distribution. Accordingly, the proper interpretation of Section 1084(b) appears to the Court to be that plaintiffs' activities are within the exception of **transmission of information for use in news reporting** of sporting events or contests.

In summary, it is the Court's opinion that Section 1084(a) prohibits the transmission of gambling information in interstate commerce by persons directly or indirectly engaged in the business of betting or wagering, but that Section 1084, in its present form, does not reach such transmission by or to persons engaged in the publication for sale to the general public through the normal channels of newspaper distribution of periodicals such as those published by plaintiffs which contain information similar or identical to that contained in newspapers of general circulation.

[7] A second federal statute which the government alleges the plaintiffs violated is Title 18 U.S.C. § 1953. This contention is based upon the fact that on July 20, 1962, a jury in the United States District Court for the Western District of Kentucky found plaintiffs guilty on four counts of a twelve count indictment and not guilty on the remaining eight counts. There is in the record before this Court a copy of the Indictment in that case, No. 25,778, and the Trial Order entered by the Honorable Henry L. Brooks, United States District Judge, who presided over the jury trial.

The counts numbered 2, 3, 4 and 5, on which plaintiffs (there defendants) were found guilty, alleged briefly as follows:

Counts 2 and 3 charge that the plaintiffs violated Title 18 U.S.C. § 1953 and Title 18 U.S.C. § 2, in that, on two separate occasions, they sent by motor express from Chicago to Louisville certain skids of paper to be used in the production of the Louisville Daily Sports News.

Counts 4 and 5 charge a violation of the same sections in that, on two occasions, plaintiffs sent copies of the over-night edition of the Illinois Sports News from Chicago to Louisville for use in the production of the Louisville Daily Sports News.

Title 18 U.S.C. § 1953 reads as follows:

> "(a) Whoever, except a common carrier in the usual course of his business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both."
>
> "(b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetracks or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication."
>
> "(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia."

Section 2 of that Title merely provides that one who aids, abets, counsels, commands, induces, procures or

causes an illegal act to be done is a principal and is punishable as such.

The counts on which defendants there were found not guilty included seven (six through twelve) in which they were charged with violating the same sections, 1953 and 2 of Title 18, by sending the finished publication, the Louisville Daily Sports News, from Louisville, Kentucky, to Jeffersonville, Indiana, on seven different dates. The remaining count on which they were found not guilty was count 1 charging a conspiracy to violate Section 1953.

This Court has before it, as the government has correctly pointed out (Reply Memorandum, P. 2), none of the evidence presented to the jury in the Louisville case. Accordingly, it has no basis for determining on what facts the jury reached its verdict. Nor will it speculate thereon, although both the government and the plaintiffs have presented extensive argument based on evidence allegedly introduced in Louisville and urged conclusions predicated thereon.

Similarly, there are not before this Court the instructions of the trial judge. The only information which the Court does have before it is that (1) plaintiffs here were convicted by a jury in the United States District Court in Louisville under Sections 1953 and 2 of Title 18 on counts charging them with sending from Chicago to Louisville skids of paper and copies of the overnight edition of the Illinois Sports News for use in publishing the Louisville Daily Sports News, and (2) plaintiffs were acquitted on all other counts.

It should be noted that none of the counts charged, nor were plaintiffs convicted of, any illegal use of telephone or telegraph facilities. The government urges, however, that a necessary inference from the convictions is that the Louisville Daily Sports News is "paraphernalia * * * used * * * or designed for use in * * * bookmaking," and since it is stipulated in the instant case that plaintiffs used the telephone and telegraph to transmit information from Chicago to Louisville for use in its publication, it

follows that such facilities were used to transmit gambling information.

The only difficulty with the government's contention is that on the basis of the bare record of the Louisville proceedings before this Court, the exact opposite inference seems at least equally logical. On seven counts charging that sending the finished publication, the Louisville Daily Sports News, from Louisville to Jeffersonville, Indiana, constituted the interstate shipment of bookmaking paraphernalia, the jury returned not guilty verdicts. Since there was apparently no dispute that the shipments were in fact made on the dates charged, it is arguable that the jury must have concluded that the finished product was not gambling paraphernalia.

In short, the simple fact of the matter is that no conclusion can be drawn with any assurance on the basis of the Indictment and Judge Brooks' Trial Order on the sole question before this Court, i.e., whether telephone or telegraph facilities were used by plaintiffs for the purpose, in the language of Section 1084(d), "of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law."

In connection with all of the foregoing, however, it should be noted that the question of the proper inferences to be drawn from the Louisville jury's verdict is, in the last analysis, academic in view of the conclusion previously reached herein that plaintiffs' publications are within the exception of Section 1084(d). That section excludes from the provisions of Section 1084(d) transmission of "information for use in news reporting of sporting events or contests."

It should further be noted that Section 1953 contains similar although not identical language excepting from its prohibitions "any newspaper or similar publication." Again, it can be urged that the jury's verdict of guilty with respect to the shipment of skids of paper and copies of the overnight edition of the Illinois Sports News for use in printing the Louisville Daily Sports News com-

pels the conclusion that the jury found the latter not within the exception. And again, the fact of the not guilty verdicts with respect to the interstate shipments of the finished publication is consistent with exactly the opposite inference.

Happily, in the Court's view of the case, the battle of inferences need not be waged, interesting though it might be. While, in my opinion, the government has failed to meet the burden of proof on this issue, the question is fully resolved, as already indicated, by the conclusion that whatever the jury in Louisville decided is academic by virtue of the provisions of Section 1084(b).

[8] With respect to the application of Title 18 U.S.C. § 1952 and Title 47 U.S.C. § 501, the former which deals with interstate and foreign travel of transportation in aid of racketeering activities is clearly inapplicable to the facts here present. And the government concedes that the latter section is relevant only in the event that plaintiffs are found to have violated either Section 28-1(a) (10) of the Illinois Criminal Code or Section 1084(a) of Title 18 U.S.C. Since the evidence does not establish that plaintiffs' activitie are in violation of either of the foregoing sections, consideration of the applicability of Section 501 becomes unnecessary.

[9] Similarly, since it is well established that the constitutionality of an Act of Congress may not be considered unless necessary to decision, the Court need not determine that issue with respect to Section 1084(d) of Title 18. *Communist Party, U.S.A.* v. *Catherwood*, 1961, 367 U.S. 389, 392, 81 S.Ct. 1465, 6 L.Ed.2d 919.

It is obvious, of course, that the power of Congress to foreclose publication of periodicals ilke plaintiffs', or the desirability of so doing, is not here decided. What is decided is that Congress has not yet purported to do so or to authorize the executive branch of the government to accomplish the same end by ordering withdrawal of essential services. Proscription of long-established, openly conducted businesses may on occasion be necessary or

desirable in the public interest and may constitute a proper exercise of governmental authority. The power to determine if and when such action should be taken, however, rests, under the Constitution, with the Congress, not the executive or the judiciary. The legislative process is frequently irksome to those who believe they clearly perceive public problems and means for their solution. Sometimes one of the prices of our democratic process is slow progress. But the courthouse is not a by-pass around the houses of Congress.

The government has failed to establish by a preponderance of the evidence that plaintiffs' activities are within the ambit of Section 1084(d), Title 18 U.S.C. Accordingly, permanent injunctions restraining defendants Telephone Company and Western Union from withdrawing their services will be entered.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 772

TELEPHONE NEWS SYSTEM, INC., APPELLANT

v.

ILLINOIS BELL TELEPHONE COMPANY AND UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MEMORANDUM FOR THE UNITED STATES

1. This is an appeal from a judgment of a statutory three-judge court, sitting in the Northern District of Illinois, dismissing appellant's complaint which sought an injunction permanently restraining the Illinois Bell Telephone Company from terminating appellant's telephone service.

The suit attacked the constitutionality of 18 U.S.C. 1084(d) which provides:

> When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for

723-477—64

> the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored.

Appellant, a corporation, used its telephones solely to give out recorded race-result information from the major race tracks throughout the country—including the mutuel price paid on the winning horse. These race results were furnished without charge to any person who dialed its number.[1] Appellant's sole source of income was received from the Illinois Sports News Company which printed racing publications known as "scratch sheets".

On April 25, 1962, Assistant Attorney General Herbert J. Miller, Jr., acting under 18 U.S.C. 1084(d), requested the telephone company to discontinue appellant's telephone service after giving it reasonable notice on the ground that the telephone facilities "are

[1] Until April 30, 1962, appellant also furnished, prior to the races, "scratches", *i. e.*, the names of the horses withdrawn from competition before the races.

being and will be used for the transmission and receiving of gambling information in interstate commerce in violation of Federal law". On April 27, 1962, the telephone company notified appellant that, in compliance with the letter of the Assistant Attorney General, it intended to discontinue telephone service on May 5, 1962. Appellant then filed its complaint for injunctive relief, claiming that its activities did not violate 18 U.S.C. 1084(d) and that the statute, if applicable, violated the United States Constitution. The court entered a temporary restraining order and the United States intervened as a party.

A single judge, following a hearing, determined that appellant used its telephone facilities to furnish betting information, that this information was used by a professional gambler and that nothing in the record indicated a legal use for this information. He concluded that appellant transmitted gambling information in interstate commerce "in violation of Federal, State, or local law", finding specifically that the information violated Section 28–1(a)10 of the Illinois Criminal Code of 1961. The district court then ordered a statutory three-judge court convened to rule on appellant's constitutional contentions. 210 F. Supp. 471. Before the three-judge court, appellant contended, *inter alia,* that Section 1084(d) was unconstitutional because it authorized a criminal prosecution under the guise of a civil procedure. The court below rejected this argument. Relying on *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, it found that the congressional purpose in enacting this legislation was

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to prevent the continued transmission of information needed for professional gambling. 220 F. Supp. 621.

2. In view of the fact that the statute involved, 18 U.S.C. 1084(d), is a new one and the matter of first impression, the government did not file a motion to affirm. After further study, however, we are persuaded that this appeal does not present a substantial question which would warrant plenary review by this Court. Our reasons for this conclusion are as follows:

a. In this case, the statute was applied to a telephone used for no purpose other than providing the results of horse races. As Judge Will said, "there is nothing in the record of this case indicating any lawful use of plaintiff's facilities." Appellant had no right to the continued illegal use of plaintiff's telephones.

Appellant's principal argument is that 18 U.S.C. 1084(d) is unconstitutional because it is in actuality a criminal sanction. The court below properly concluded that the legislative aim in enacting subsection (d) was regulatory and not penal. Contrary to petitioner's contention, subsection (d) does not require that the user of the facility be guilty of a wagering law violation. Under subsection (d) a common carrier must withdraw or deny communication facilities used or intended for a use which will assist the violation of any wagering law. The section is designed to restrict the transmission of gambling information—of the raw material needed for illicit wagering. In a different section of the statute, 18 U.S.C. 1084(a), Congress did provide a criminal sanction for persons engaged in the wagering business who

knowingly transmit in interstate commerce wagers or information assisting in the placing of bets. The provision for removal of the telephones in 1084(d) was, it is apparent, designed as a prophylactic or regulatory measure.

The legislative history supports this conclusion. Section 1084 was a "marriage of two pending bills", S. 1656 and S 528 in the 87th Congress, 107 Cong. Rec. 13900–13902. As introduced, S. 1656 would have made it a crime for anyone to furnish any wire communication facility with intent that it be used for the transmission in commerce of wagers or wagering information. It contained no provision similar to subsection (d). At the hearing on this bill, telephone company representatives objected insofar as the bill imposed criminal penalties. They suggested legislation similar to S. 528, a bill without any criminal sanctions, authorizing the removal of their facilities upon notification by a law enforcement official of illegal use and relieving them of civil liability if facilities were removed pursuant to this procedure. Hearings on S. 1653–1658, 1665, Committee on the Judiciary, United States Senate, 87th Cong., 1st Sess., pp. 37–46. The Senate Committee then added as an amendment language derived from S. 528—the part of the statute which is now subsection (d). It stated that this provision "will provide additional assistance to the States in preventing the transmission of gambling information". S. Rep. No. 588, 87th Cong., 1st Sess. p. 2.

b. Appellant makes two other contentions: (1) That evidence that a particular gambler used appellant's facilities in a period before October 1961 was inadmis-

sible because the use occurred prior to the effective date of Section 28–1(a)(10) of the Illinois Code, the State statute found by the court to have been violated by appellant's activities; and (2) that this State statute, in prohibiting the transmission of betting information, is unconstitutional because it violates the guarantees of free speech and discriminates against appellant.

Neither of these arguments is substantial. The testimony that the information was used by a gambler merely demonstrated the obvious—that the service was one designed to aid illicit wagering. Applied to the facts of this case, the prohibition against the use of telephone facilities to transmit wagering information neither violates the First Amendment nor discriminates against appellant's business since the telephones were used only to transmit wagering information. The singleness of purpose in appellant's use sharply distinguishes this situation from one where the results of races are printed in a newspaper of general coverage and circulation.

CONCLUSION

For the reasons stated, we believe that the Court may deem it appropriate to affirm the judgment without further argument.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

MARCH 1964.

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No. 772

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

TELEPHONE NEWS SYSTEM, INC.,
an Illinois corporation,

Plaintiff-Appellant,

vs.

ILLINOIS BELL TELEPHONE COMPANY,
an Illinois corporation,

Defendant-Appellee,

UNITED STATES OF AMERICA,

Intervenor-Defendant-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

REPLY OF TELEPHONE NEWS SYSTEM, INC., TO MEMORANDUM FOR THE UNITED STATES

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IN THE

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REPLY OF TELEPHONE NEWS SYSTEM, INC., TO MEMORANDUM FOR THE UNITED STATES

The Memorandum for the United States only serves to underscore the fact that the questions presented by this appeal are substantial.

Illustrative of what we say is the fact that the government did not file a motion to affirm within the time prescribed by Rule 16 of this Court. When the motion finally was filed, two weeks late, the Memorandum contained

the candid admission that the government had originally decided not to move to affirm because the statute involved is a new one and a matter of first impression (Gov't's. Memo., p. 4). The government explains the reversal of its initial decision by saying that after further study it was persuaded this appeal does not present a substantial question requiring plenary review by this Court (Govt's. Memo., p. 4). We believe a brief examination of that statement is warranted.

As the government concedes, the statute in question is new, having been enacted in the fall of 1961 (App. 13A). It was a law sponsored by the Justice Department and shepherded by its reprsentatives through the Congress (Appellant's Exs. E, F, G, H). The Attorney General of the United States, Robert F. Kennedy, and Mr. Herbert J. Miller, Jr., Assistant Attorney General in charge of the Criminal Division, testified in support of the bill (App. 71A, 72A; Appellant's Exs. E, F, G, H). Since its enactment into law, the government has brought a substantial number of proceedings under the statute.[1]

In light of these circumstances and against this background, the original decision of the government not to file a motion to affirm could not have been other than carefully thought out; it was patently not casually reached. Obviously, the question must have been resolved with due regard to the Justice Department's well-defined interest in this law. Therefore, at least during the thirty day period afforded by Rule 16 to file a motion to affirm, the government was in agreement with us concerning the substantial

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[1] *Kelly* v. *Illinois Bell Telephone Company*, 325 F. 2d 148; *United States* v. *Bergland*, 209 F. Supp. 547, reversed, *United States* v. *Bergland*, 318 F. 2d 159; *Marcus* v. *United States*, 310 F. 2d 143; *United States* v. *Synodinos*, 218 F. Supp. 479; *United States* v. *Smith*, 209 F. Supp. 907; *United States* v. *Yaquinta*, 204 F. Supp. 276.

nature of the questions presented by this appeal. The fact that it elected to change its position after the time for filing the motion expired is not an impelling reason for concluding that its decision in the first instance was erroneous.

Additionally, there is the government's apparent unwillingness to meet our contention that appellant has been found guilty of violating a statute not in existence at the time of the claimed violation, and that appellant was thus exposed to the operation of an *ex post facto* law. Also, there is an avoidance of any real argument on the constitutional issue, seemingly on the professed ground that appellant is obviously guilty of violating the Illinois statute and, therefore, somewhat less entitled to the constitutional safeguards than one whose guilt has been less positively established.

On the basis of the foregoing, it is felt that it would be more convenient for the Court were we to reply first to the government's answer to our argument that there was no evidence to sustain the finding of the single judge and three-judge court that appellant had violated Section 28-1 (a)(10) of the Illinois Criminal Code.

On pages 5 and 6 of its Memorandum, the government states the issue as follows:

> "b. Appellant makes two other contentions: (1) That evidence that a particular gambler used appellant's facilities in a period before October 1961 was inadmissible because the use occurred prior to the effective date of Section 28-1(a) (10) of the Illinois Code, the State statute found by the court to have been violated by appellant's activities: . . ."

It answers in this way (Govt's. Memo., p. 6):

> "The testimony that the information was used by a gambler merely demonstrated the obvious—that the

> service was one designed to aid illicit wagering. Applied to the facts of this case, the prohibition against the use of telephone facilities to transmit wagering information neither violates the First Amendment nor discriminates against appellant's business since the telephones were used only to transmit wagering information."

Manifestly, this only begs the question as to whether the described evidence was admissible or not. And the manner in which the government attempts to shrug off this issue is fairly suggestive of the fact that there is really no way to justify the finding of the courts below that appellant was guilty of violating a criminal statute, when the operational facts giving rise to the alleged violation occurred several months prior to the effective date of the law.

The vice of the government's argument is obvious. The identity of the person using the information transmitted by the appellant is immaterial. The issue is whether the Illinois Criminal Code could operate retroactively against appellant on the basis of transactions occurring three months prior to the effective date of the statute. The only question presented, and the one left unanswered, is: Was there any evidence introduced to prove that appellant's facilities were used by *anyone* subsequent to January 1, 1962, the date the Illinois Criminal Code became effective? The answer is no. Without such evidence, the record is completely devoid of *any* proof to support the finding that appellant was in violation of the Illinois statute.

And this proof is not supplied by quoting out of context the observation of Judge Will that, "[T]here is nothing in the record of this case indicating any lawful use of plaintiff's facilities." Nor is any such proof required.

Appellant was on trial for a criminal offense. No defendant charged with a crime is required to prove his innocence. Both courts below took pains to point out that, (a) although appellant was nominally the plaintiff in a civil proceeding wherein it sought a temporary injunction, the burden of proof lay with the government to show by a preponderance of the evidence that appellant was guilty of a law violation (App. 8A, 23A, 65A), (b) that despite the action being labeled a civil proceeding, it was quasi-criminal in nature (App. 65A), and (c) appellant was not required to come forward with evidence, much less testimony, until the government had satisfied its burden that appellant's service was being supplied in violation of law (App. 23A).

Nor is the government's characterization of appellant's business as "illegal" and as a "service designed to aid illicit wagering" an adequate substitute for relevant, competent proof that appellant was, in fact, engaged in an illegal or illicit enterprise or had violated some law. There is no such proof in this case, and to uphold the finding of the lower courts in that regard would be in direct conflict with this Court's decision in *Burgess* v. *Salmon*, 97 US 381, cited and discussed originally at pages 19 and 20 of our Jurisdictional Statement.

The facts and the law applicable to this facet of the case are simple and uncomplicated. To labor the subject further would, we feel, only demonstate that we have a distressing grip on the obvious.

In answering our argument directed to the constitutionality of Section 1084(d), the government says, as the majority of the three-judge court did, that 1084(d) is regu-

latory only, not penal, that subsection (d) does not require that the user of the facility be guilty of a wagering law violation and, therefore, one charged with having violated a Federal, State, or local law relating to the transmission or receiving of gambling information in interstate commerce is not entitled to the constitutional guaranties afforded one accused of a crime.

Regardless of whether it is the government's conclusion that Section 1084(d) was designed as a prophylactic or regulatory measure (Gov'ts. Memo., p. 5), the inquiry must be directed to substance, not to form, *Trop* v. *Dulles*, 356 US 86, 95, 96. The *sine qua non* of the removal of appellant's telephone facilities under Section 1084(d) is the finding in a civil action that appellant has been guilty of violating a criminal statute. The government conducts the prosecution and admits that it is the real party in interest. The indictment consists of a letter from the Justice Department to a telephone company charging that appellant is in violation of Federal law; at the conclusion of the case the appellant is found guilty of violating a state law. All without the constitutional safeguards extended to everyone accused of a crime. Here, the quantum of proof is merely a preponderance of the evidence, and the result is the demise of the appellant.

The semantics of the regulatory versus punitive character of this law contained in the majority opinion of the three-judge court and restated here by the government should not be the basis for a determination that the constitutional question is unsubstantial and that this Court should, therefore, decline to note its probable jurisdiction.

Again, we advert to Judge Will's concurring opinion in which he sums up most persuasively what we have here tried to say (App. 50a):

> "In this connection, it should be noted that the recent Supreme Court decision of *Kennedy* v. *Mendoza-*

Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed. 2d 644 (1963), discussed in Judge Hoffman's opinion, held invalid as punitive a section of the Immigration and Nationality Act of 1952 which automatically divested an American of his citizenship without the necessity of any prior criminal trial if he left or stayed outside the country to avoid the draft. The Court concluded that forfeiture of citizenship was clearly punishment. It seems to me that where the forfeiture of property will be fatal to the business life of the party involved and substantially greater and more severe than the maximum punishment which could have been imposed in a direct criminal proceeding, labelling it preventive and non-penal is a sophistry which hardly warrants the abrogation of the Constitutional protections which are the keystones of American criminal justice."

CONCLUSION

We respectfully submit that the government's Memorandum does nothing to detract from the arguments advanced in our Jurisdictional Statement. We believe the Memorandum simply serves to demonstrate that the questions presented are substantial and that this Court should, therefore, note its probable jurisdiction.

Respectfully submitted,

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